Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

Edward VanGuilder,
Petitioner

v.

United States of America,
Respondent

Edward VanGuilder,
Petitioner

v.

State of New York,
Respondent

Petition for Complementary Writs of Certiorari Relative to Two Inextricably Related Constitutional Cases

To the U.S. Court of Appeals, District of Columbia And to the New York State Court of Appeals

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The Question Presented

I repeat the question presented by Thomas, J., in *Lara v. US*, 541 US__(2004):

In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously....

...In 1871, Congress enacted a statute that purported to prohibit entering into treaties with the "Indian nation[s] or tribe[s]." 16 Stat. 566, codified at 25 USC §71. Although this Act is constitutionally suspect (the Constitution vests in the President both the power to make treaties, Art. II, §2, cl. 2, and to recognize foreign governments, Art. II, §3; see, *e.g.*, *United States v. Pink*, 315 US 203, 228-230 (1942)), it nevertheless reflects the view of the political branches that the tribes had become a purely domestic matter.

To be sure, this does not quite suffice to demonstrate that .

...Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases.

(note 4)...this is precisely the confusion that I have identified and that I hope the Court begins to resolve....

I believe we must examine more critically our tribal sovereignty case law. Both the Court and the dissent, however, compound the confusion by failing to undertake the necessary rigorous constitutional analysis. I would begin by carefully follow-

ing our assumptions to their logical conclusions and by identifying the potential sources of federal power to modify tribal sovereignty....

I do, however, agree that this case raises important constitutional questions that the Court does not begin to answer. The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty...and I would be willing to revisit the question....

The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain the tribes possess anything resembling "sovereignty."

The Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty. Such an acknowledgement might allow the Court to ask the logically antecedent question *whether* Congress (as opposed to the President) has this power. A cogent answer would serve as the foundation for the analysis of the sovereignty issues posed by this case. We might find that the Federal Government cannot regulate the tribes through ordinary domestic legislation and simultaneously maintain that the tribes are sovereigns in any meaningful sense. But until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.

Opinions Below

Not applicable. This is an appeal against the neglect below to provide timely remedies that give legal force and effect to Indian constitutional jurisdiction.

Jurisdiction

Art. III, §2 enacts:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;...

This confirms the hierarchy of law that constitutes the rule of law in this constitutional democracy:—"this Constitution">"the Laws of the United States">"Treaties">all other laws.

The neglect below concerning remedies *de facto* leaves "the Laws of the United States">"this Constitution" and, correspondingly, it unconstitutionally allows "Federal Indian rights" to preempt "Indian constitutional jurisdiction."

This Court's jurisdiction exists, above all, to guard the people's sovereignty against usurpation. *Scott v. Sandford*, 19 How. 393 (1857).

Statement of the Case

The constitution precludes Federal and/or State jurisdiction on territory whose root of title is not traced to a duly registered Presidential territorial purchase. *Constitution,* Art. II, §2, cl. 2, *per* Thomas, J., in *Lara v. US,* 541 US__(2004), *supra,* pp. **(i)** and **(ii)**; Appendix of Constitutional Legislation and Precedents, *infra,* pp. **6a-21a**.

The continuity of the line of constitutional legislation and precedents 1633-1871 confirming this stopped abruptly in 1871 with the advent of Federal domestic law statute 16 Stat. 566, codified at 25 USC §71, until, on April 19, 2004, Thomas, J., identified the constitutional conflict informing the era 1871-2004.

Procedural delay now blocks the addressing of that conflict and thereby preempts the constitutional law:—

The Federal court system proceeds (pp. **22a, 23a, 30a**) as if the previously vested Indian constitutional jurisdiction is no longer arguable as against the USA because preempted by the Federal domestic law *Quieting of Titles Act.*

The State court system with original, residual, general and inherent jurisdiction decides by not ruling. It simply does not respond in writing to my show cause application raising the same constitutional question, and then rests upon the state appeal court clerk's procedural ruling (p. **39b**) there is no appealable paper capable of being appealed.

The combined effect is the subversion of the constitution. *Contra, Scott v. Sandford*, 19 How. 393 (1857).

Relief Requested:

Therefore I respectfully ask this Court to address the constitutional question being neglected below and, having done so, then to remit both cases to the courts below for application of the constitutional answer so obtained to the contingent questions of mixed fact and law as they may appear from time to time in each respective case.

Reasons for Allowing the Writs

I repeat the reasons of Thomas, J., *supra*, pp. **(i)** and **(ii)** and I purport, in response, "**to demonstrate that the tribes lost their sovereignty,**" pursuant to the rule of law. Appendix, *infra*, pp. **6a-21a**.

My submission is that the preemption jurisdiction was saved by the word "**Treaties**" in Art. II, §2, cl. 2 and, by operation of constitutional law alone, that necessarily implies a corresponding restriction on Indian alienation.

Since sovereignty is unrestricted therefore the said restriction converts the former Indian sovereignty into the constitutional jurisdiction upon which I rely.

No post-1871 Federal Indian law legislation or precedent can have repealed the previously established Indian constitutional jurisdiction by subordinating it to Federal domestic jurisdiction, such as was legislatively attempted by 16 Stat. 566, codified at 25 USC §71. See, *e.g.*, *Oneida Indian Nation v. County of Oneida*, 44 US 661 (1974) (Oneida I); *contra*, *Scott v. Sandford*, 19

How. 393 (1857); *c.f.*, E.V. Dicey, (Harvard Faculty of Law) *Lectures on the Relationship between Law and Public Opinion in England in the Nineteenth Century*, London, Macmillan, 1920, p. 483:

Judge–made law is subject to certain limitations. It can not openly declare a new principle of law: it must always take the form of a deduction from some legal principle whereof the validity is admitted, or the application or interpretation of some statutory enactment. It can not override statutory law. The courts may, by a process of interpretation, indirectly limit or possibly extend the operation of a statute, but they can not set a statute aside. Nor have they in England ever adopted the doctrine which exists, one is told, in Scotland, that a statute may be obsolete from disuse. It can not by nature override any established principle of law.

The rule of law's constitutive doctrine of *stare decisis* signifies the earlier preempts the later rather than the other way round.

November 5, 2004. **Respectfully submitted,**

/s/
Edward VanGuilder

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(*pro se*)

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

	) CASE NUMBER:
	) 1:03CV01934
Between:	)
	) JUDGE:
Edward VanGuilder,	) James Robertson
Plaintiff,	)
	) DECK TYPE: Civil
v.	) Rights (non-
	) employment)
United States of America,	)
	) DATE STAMP:
Defendant.	) 09/15/2003
	)
	) COMPLAINT

(1) Court jurisdiction is confirmed by 28 USC §§1331, 1343(3), 1343(4), 1345, 1362, 1391(b), 2201 and 2202.

(2) Plaintiff inherited the Mahican aboriginal title to the reservation in the Indian treaty of April 25, 1724, and to Governor's Island. 25 USC §194. *An Act concerning purchases of lands from the Indians*, Stat. Prov. NY 1684, c. 9. *An Act to prevent and make void clandestine and illegal purchases of lands from the Indians*, Stat. Prov. Mass. Bay 1701-02, c. 11.

(3) The defendant usurps the Indian sovereignty (the constitutional common law right of occupancy and jurisdiction of self-government) sheltering under the said ti-

tle, by applying the defendant's own domestic law, by condoning the said state's application of the state's domestic law and by clothing the defendant's constituents including the state of New York with an unconstitutional domestic law color of right in relation to adverse possession. *Constitution*, Art. I, §10. *Scott v. Sandford*, 19 How. 393 (1857).

September 9, 2003.

/s/

Edward VanGuilder
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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Between:	
Edward VanGuilder, Plaintiff,	Judge James Robertson
v.	
	Case No. 1:03cv01934
United States of America, Defendant.	

MOTION FOR SUMMARY JUDGMENT

Plaintiff hereby moves for summary judgment as a matter of law alone based upon the "intervening change of controlling law" constituted by the April 19th ruling of Thomas, J., in *United States v. Lara*, 541 US __ (2004). 25 USC §71 is ***prima facie*** unconstitutional.

Since the plaintiff is not a citizen or subject of a "Foreign State" within the meaning of the 11th Amendment but rather is a "Indian" within the meaning of 25 USC §194 confirming *Clark v. Williams*, 36 Mass. R. 499, 500,501 (1837), THEREFORE, THE NECESSARY IMPLICATION IS, plaintiff is entitled to summary judgment unless and until defendant pleads and proves a Treaty of purchase within the meaning of Article 1, §10, cl. 1 relative to the lands in question.

Plaintiff does not know the reason the Court acted on May 14th upon the defendant's opposition dated May

12th before the plaintiff, who is not on the electronic filing system, had even received notice of the opposition. Annexed hereto as Exhibits "A" and "B" respectively are, the (superseded) Amended [per note 1 page 4] Plaintiff's Motion to Reconsider the Dismissal of the Plaintiff's Motion to Strike dated May 12, 2004, and his Reply to Opposition to Reconsideration of Motion to Strike the Reply to Opposition to Motion to Dismiss the Complaint, dated May 18, 2004.

Plaintiff submits it would be contrary to the public interest not to respond in a timely fashion, or to respond in a *per incuriam* fashion to the constitutionally critical invitation extended by Thomas, J., on April 19th. The jurisprudentially critical aspect of the confusion Thomas, J., identified as the consequence of the oxymoronic and unconstitutional Federal law is, reasonableness has replaced truth as the paramount jurisprudential value in practice in breach of the principle of constitutional democracy identified and settled by *Scott v. Sandford*, 19 How. 393 (1857). Correspondingly resolving the confusion appropriately entails reasons for judgment that not only address the 10th Amendment to the *Constitution* but explain its jurisprudential import in relation to the existence of justice under the rule of law.

AMENDMENT X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

May 19, 2004.

Respectfully submitted,

/s/

Edward VanGuilder

APPENDIX OF CONSTITUTIONAL LAW

An Act concerning purchases of lands from the Indians, Stat. Prov. NY 1684, c. 9. Bee itt Enacted by this Gen'll Assembly and by the authority of the same that from henceforward noe Purchase of Lands from the Indians shall be deemed a good Title without Leave first had and obtaineid from the Governor signified by a Warrant under his hand and Seale and entered on Record in the Secretaries office att New Yorke and Satisfaction for the said Purchase acknowlidged by the Indians from whome the Purchase was made is to bee Recorded likewise which Purchase soe made and prosecuted and entered on Record in the office aforesaid shall from that time be Vallid to all intents and purposes.

An Act to prevent and make void clandestine and illegal purchases of lands from the Indians, Stat. Prov. Mass. Bay 1701-02, c. 11. WHEREAS the government of the late colonys of the Massachusetts Bay and New Plymouth, to the intent the native Indians might not be injured or defeated of their just rights and possessions, or be imposed on and abused in selling and disposing of their lands, and thereby deprive themselves of such places as were suitable for their settlement and improvements, did, by an act and law named in the said colonys respectively many years since, inhibit and forbid all persons purchasing any land of the Indians without the licence and approbation of the general court, notwithstanding which, sundry persons for private lucre have presumed to make purchases of lands from the Indians, not having any license or approbation as aforesaid for the same, to the injury of the natives, and great disquiet and disturbance of many of the inhabitants of this province in the peaceable possession of their lands and inheritances lawfully acquired; therefore, for the vacating of such illegal purchases, and preventing of the like for the future,—*Be it enacted and declared by the Lieutenant-Governor, Council and Representatives in General Court assembled, and by the authority of the same,*

[SECT. 1.] That all deeds of bargain, sale, lease, release or quitclaim, titles and conveyances whatsoever, of any lands, tenements or hereditaments within this province, as well for term of years as forever, had, made, gotten, procured or obtained from any Indian or Indians by any person or persons whatsoever, at any time or times since the year of our Lord one thousand six hundred thirty-three, without the license or approbation of the respective general courts of the said late colonys in which such lands, tenements or hereditaments lay, and all deeds of bargain and sale, titles and conveyances whatsoever, of any lands,

tenements or hereditaments within this province, that since the establishment of the present government have been or shall hereafter be had, made, gotten, obtained or procured from any Indian or Indians, by any person or persons whatsoever, without the licence, approbation and allowance of the great and general court or assembly of this province for the same, shall be deemed and adjudged in the law to be null, void and of none effect: *provided, nevertheless,*—...

And be it further enacted by the authority aforesaid,

[SECT. 4.] That if any person or persons whatsoever shall, after the publication of this act, presume to make any purchase or obtain any title from any Indian or Indians for any lands, tenements or hereditaments within this province, contrary to the true intent and meaning of this act, such person or persons so offending, and being thereof duly convicted in any of his majestie's courts of record within this province, shall be punished by fine and imprisonment, at the discretion of the court where the conviction shall be, not exceeding double the value of the land so purchased, nor exceeding six months' imprisonment.

[SECT. 5] That all leases of land that shall at any time hereafter be made by any Indian or Indians for any term of years, shall be utterly void and of none effect, unless the same shall be made by and with licence first had and obtained from the court of general sessions of the peace in the county where such lands lye: *provided nevertheless*, that nothing in this act shall be taken, held or deemed in any wise to hinder, defeat or make void any bargain, sale or lease of land made by one Indian to another Indian or Indians.

The Constitution of the United States of America, 1789, Art. I, §8.3 Congress shall have Power To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes; §9.3 No...ex post facto Law shall be passed; §10.1 No State shall enter any Treaty;

Marshall v. Clark, 1 Kentucky R. 77, 80-81 (1791). The old claim of the crown, by the treaty of 1763, extended to, and was limited by the Mississippi including the land in dispute, which gave a right to the crown as against other European nations, and fixed the limits of titles to be derived from that source to the citizens of Virginia. The dormant title of the Indian tribes remained to be extinguished by government, either by purchase or conquest, and when that was done, it inured to the benefit of the citizens who had previously acquired a title from the crown, and did not authorize a new grant of the lands as waste and unappropriated. This being the case at the time of revolution, when the commonwealth

succeed[ed] to the royal rights...in the opinion of the court, the Indian title did not impede either the power of the legislature to grant the land to officers and soldiers, or to the location of the lands on treasury warrants, the grantee in either case must risk the event of the Indian claim, and yield to it if finally established, or have the benefit of a former or future extinction thereof.

Weiser v. Moody, 2 Yeat's 127, 127-8 (Penn. SC) (1796). The court declared their opinion to the jury, that if the late proprietaries, or their officers, knew that the lands surveyed for Conrad Weiser, lay out of the then Indian purchases, and granted them under full knowledge thereof, the patent would enure for the benefit of the grantee, when the lands came afterwards to be purchased from the Indians; and the proprietaries could not pass the title to a stranger....[But] it cannot be presumed that the proprietary officers knew the lands surveyed for Conrad Weiser to be without the limits of their purchases [from the Indians]....If the King is deceived in his grant, it will be avoided. Any contract or deed will be vitiated by a *legatio falsi sive suppressio veri.*

Sherer v. McFarland, 2 Yeat's 124, 225, 226 (Penn. SCR) (1797). We are no enemies to *bona fide* improvements, restricted within rational limits. But these were never deemed to extend beyond land purchased from the Indians. Such as system would be wild, as well as highly impolitic, and would tend to deluge the country in blood, by provoking the savage nations to hostilities....It must be admitted, that the lords of the soil had the exclusive right of disposing of their lands in their own mode.

Fletcher v. Peck, 6 Cranch's 87, 142-3 (1810). The majority of the Court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it has been legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.

Johnson v. McIntosh, 8 Wheat. 543, 574, 585, 588, 591, 592, 596 (1823). [The different nations of Europe] claimed and exercised, as a consequence of their ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy....They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, according to their own discretion.... While the different nations of Europe

respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been well understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy....It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it....All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy....[T]he Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession their lands, but to be incapable of transferring the absolute fee to others....[T]he Indian title, which, although entitled to the respect of all Courts until it should be extinguished, was declared not to be absolutely repugnant to a seisin in fee on the part of the State. ...The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to that title. The lands, then, to which this proclamation referred, were lands which the king had had a right to grant, or to reserve for the Indians.

Danforth v. Wear, 9 Wheat. 673, 675, 677 (1824). As to lands surveyed within the Indian boundary, this Court has never, hesitated to consider all such surveys and grants as wholly void...[although it was argued that the State grant] was only suspended by the Indian title, and attached legally and effectually to the soil, as soon as the interposing title of the Indians was removed...the inviolability of the Indian territory is fully recognized.

Cornet v. Winton, 2 Yerger Tenn. CA 129, 149 (1826). ...the Indian nation was no party to this grant; its usufructory title was not thereby affected. North Carolina had no right to take it from the Indians for Stuart's benefit, without their consent; this consent they have not given, and therefore no right to prosecute this action to recover the possession of the land has ever vested in Stuart; hence he must fail upon the weakness of his own title.

Cherokee Nation v. State of Georgia, 5 Pet. 1, 17, 49, 76 (1831). Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it

may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian....While the different nations of Europe respected the rights of the natives as occupants they asserted the ultimate dominion to be in themselves; and claimed and exercised as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy....They have not stipulated to part with that right (of occupancy); and until they do, their right to the mines stands upon the same footing as the use and enjoyment of any other part of their territory.

Worcester v. Georgia, 6 Pet. 515, 542, 544, 545, 546, 552, 553, 559, 560, 583 (1832)....discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments....This principle...gave...the sole right of acquiring the soil and making settlements on it...It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. The relation between Europeans and the natives was determined in each case by the particular government which asserted and could maintain this preemptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them....So with respect to the word "hunting grounds." Hunting was at that time the principle occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved. To the United States, it could be matter of no concern, whether their whole territory was devoted to hunting grounds, or whether an occasional village, an occasional corn field, interrupted and gave some variety to the scene. These terms had been used in their treaties with Great Britain

and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government...This was the exclusive right of the purchasing such lands as the natives were willing to sell....These grants asserted a title against Europeans only, and were considered as blank pieces of paper so far as the rights of the natives were concerned....The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians...the Indian nations possessed a full right to the lands they occupied...Except by compact we have not even claimed a right of way through the Indian lands.

Mitchell v. United States, 9 Peter's 711, 745, 746, 749, 755 (1835). We come now to consider the nature and extent of the Indian title...Indian possession or occupation was considered with the reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their right to its exclusive enjoyment in their own way, and for their own purposes, were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals...One uniform rule seems to have prevailed...by their laws; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots. Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in the possession of the Indians, though possession could not be taken without their consent. Individuals could not purchase Indian lands without permission or licence from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid with such licence, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the licence, the title of the purchaser became complete....The King waived all rights accruing by conquest or cession, and thus most sol-

emnly acknowledged that the Indians had rights of property they could cede or reserve, and that the boundaries of his territorial rights should be such, and such only, as were stipulated by these treaties. This brings into practical operation another principle of law settled and declared in the case of *Campbell v. Hall*, that the proclamation of 1763, which was the law of the provinces ceded by treaty of 1763, was binding on the king himself, and that a right once granted by a proclamation could not be annulled by a subsequent....[L]and were of two descriptions: such as had been ceded to the king by the Indians, in which he had full property and dominion, and passed in full property to the grantee; and those reserved and secured to the Indians, in which their right was perpetual possession, and his the ultimate reversion in fee, which passed by the grant, subject to the possessory right... This proclamation was also the law of all the North American colonies in relation to crown lands.

New Orleans v. Armas, 9 Pet. 224, 236 (1835). [I]t is a principle applicable to every grant, that it cannot affect pre-existing title.

New Orleans v. United States, 35 US 662, 730 (1836). It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor, no right passes to the grantee.

United States v. Fernandez, 35 US 303, 305 (1836). Nor does there appear to have been any restriction on the powers of the governor to make grants of land under Spain, other than those imposed upon the governors of Great Britain: both made grants without regard to the land being in the possession of the Indians: they were valid to pass the right of the crown, subject to their right of occupancy:...

Clark v. Williams, 36 Mass. R. 499, 500, 501 (1837). The object of this statute manifestly was, to secure the Indians from being deceived and imposed upon, and to enable the government to avail themselves of the full benefit of the crown grant of the lands to themselves and their grantees, by giving them the exclusive privilege of extinguishing and acquiring the Indians' right of occupancy...[W]e think it manifest, that this law was made for the personal relief and protection of the Indians, and it is to be limited in its operation. It is to be used as a shield, not as a sword.

Godfrey v. Beardsley, 2 McLean 412, 416 (Ind.) (1841). The Indian right is that of occupancy; and, until this right shall be extinguished by

purchase, no possession can be taken. It is also admitted, that a mere reservation of the Indian right to a certain part, within the described boundaries, leaves the right reserved, as it stood before the cession.

Balliot v. Bauman, 5 Penn. 150, 154, 155 (1843). A patent is not operative against the rights of a third person existing before the issuing of the patent. He may show that his right is better than the one who obtained the patent and for that purpose may inquire into the prior title of the patentee....[and] show his own equitable title is better. The patent conveys the full legal title of the state.

Brown v. Wenham, 10 Metcalf 496, 498 (Mass. SC)(1843). The provincial St 13 Wm 3, (1701,) entitled "an act to prevent and make void clandestine and illegal purchases of lands from the Indians," rendered void, as the foundation of title, all deeds made by Indians, without the license or approbation of the legislature, after the year 1633. ["St 13 Wm 3, (1701,)" is an alternative citation for *An Act to prevent and make void clandestine and illegal purchases of lands from the Indians,* Stat. Prov. Mass. Bay 1701-02, c. 11.]

Coleman v. Tish-Ho-Mah, Smedes & M. 40, 48 (Miss. HCEA) (1844). Theirs was a right to retain possession, and to use it according to their own discretion, though not to dispose of the soil except to the government. That claimed the ultimate dominion, and the exclusive right to grant the soil, subject to the Indian right of occupancy.

Ogden v. Lee, 6 Hill's 546, 548, 549 (NYSC) (1844). The European governments whose people discovered and made settlements in North America, claimed the sovereignty of the country, and the ultimate title, but not the immediate right of possession, to all lands within their respective limits. Upon the principle laid down by Vattel, (B. 1, & 81, 209,) they might have asserted a larger right; for the natives lived by fishing and hunting, without converting to the purposes of agriculture any considerable portion of the of the vast tracts of the country over which they wandered. But the Europeans pursued the more just and politic course of acquiring the Indian title by purchase. The claim which they set up and asserted amounted to little more than a right of preemption, or the right of purchasing from the Indians all the lands within the bounds of their respective discoveries, to the exclusion of all other nations. It is true that the British crown granted charters and issued patents for large tracts of land before the Indian right had been extinguished; and these instruments purported to convey the property in

fee. It was so of the grant made by Charles the second to his brother the duke of York in 1664, which included all the territory now constituting the states of New-York and New-Jersey. But these grants were not intended to convey, and the grantees never pretended that they has acquired an absolute fee in the land. They neither took nor claimed any thing more than the ultimate fee, or the right of dominion after the Indian title should be extinguished. And so far as the state of New-York is concerned, I am happy to say, that beyond what may have been acquired by conquest in lawful war, the Indians have never been deprived of a single foot of land without their voluntary consent. Their title by occupancy has been uniformly acknowledged, both by the colonial and state governments, from the first settlement of the country down to the present day; and it cannot now be successfully questioned in the judicial tribunals.

Stockton v. Williams, 1 Mich. R. 546, 560 (SC) (1845). The power of the government to grant the soil while in the possession of the Indians, and subject to their right of occupancy, is a proposition which has long since been settled by a series of decisions of authority.

Fellows v. Lee, 5 Denio 628 (NYCE) (1846)....the Indian title to lands is an absolute fee, and that the pre-emption right conceded to Massachusetts, was simply a right to acquire by purchase from the Indians their ownership of the soil, whenever they should chose to sell it.

Montgomery v. Ives, 13 Smedes & M. 161, 174-5 (Miss. HCEA) (1849). Let us refer to the proclamation of George III... "that it is just, and reasonable, and essential to our interest and the security of our colonies, that the several nations or tribes of Indians, with whom we are connected, and who live under our protection, should not be disturbed in the possession of such parts of our dominions and territories, as not having been ceded to, or purchased by us, are reserved to them, or any of them, as their hunting grounds." It then goes on to declare, that no governor, in any of the said provinces, shall presume, "upon any pretence whatever, to grant warrants of survey, or pass any patents for lands, beyond the bounds of their respective governments, as described by their commissions." It farther declares, "that, for the present, all the lands not included within the limits of said new governments, shall be reserved to under the sovereignty, protection and dominion of the crown, and forbids all purchases and settlements beyond those limits without special leave and license first obtained." It goes on still farther to declare a principle which seems to have been adhered to ever since,

"that no private person do make purchase of any land from any Indians, but that the same shall be purchased only for the government, in the name of the sovereign, at some public meeting of the Indians." This principle, the offspring of a just and enlightened policy, became incorporated into the intercourse of England, with the Indian tribes, and has been adopted and pursued by our own government, in all its transactions with them....On this part of the proclamation of 1763, the Supreme Court of the United States say, "This reservation is a suspension of the powers of the royal governor, within the territory reserved." *Fletcher v. Peck*, 6 Cranch, 142. It is because of this suspension, which existed at the date of this grant, that we think it has no intrinsic validity. It is an established principle in our jurisprudence, that a grant of land on which the Indian title has not been extinguished, is void. *Danforth v. Wear*, 9 Wheat. 676.

Breaux v. Johns, 4 Louisiana R. 141, 143 (1849). These grants convey a title to the grantees, subject only to the Indian right of occupancy.

Gaines v. Nicholson, 9 How. 356, 365 (1850). No previous grant of Congress could be paramount, according to the rights of occupancy which this government has always conceded to the Indian tribes within her jurisdiction. [The reservation] was so much carved out of the Territory ceded, and remained to the Indian occupant, as he never parted with it. He holds, strictly speaking, not under the treaty of cession, but under his original title, confirmed by the government in the act of agreeing to the reservation.

Marsh v. Brooks, 49 US 223, 232 (1850)....Indian title consisted of the usufruct and right of occupancy and enjoyment; and, so long as it continued, was superior to and excluded those claiming the reserved lands by patents made subsequent to the ratification of the treaty; they could not disturb the occupants under the Indian title. That an action of ejectment could be maintained on an Indian right to occupancy and use, is not open to question.

People v. Dibble, 18 Barbour's NYSCR 412, 418 (1854). The object of the law, with various other laws of the state, was to protect the indians to quiet them and render them secure.

Scott v. Sandford, 19 How. 393, 403, 404, 405, 407, 420, 426, 432, 435, 449, 450, 452, 460, 483, 484, 485, 501, 506, 508, 509, 513, 520 (1857). The question is simply this: can a negro, whose ancestors were imported into this country and sold as slaves, become a member of the

political community formed and brought into existence by the Constitution of the United States, and as such entitled to all the rights and privileges, and immunities guaranteed by that instrument to the citizen?...The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be [404] subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian governments were regarded and treated as foreign Governments as much as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first immigrants to the English colonies to the present day, by the different Governments which succeeded to each other. Treaties have been negotiated with them, and these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under the subjection of the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over the territory they occupy. But they may, without doubt, like the subjects of any foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up abode among the white population, he would be entitled to all the rights and privileges which would belong to any emigrant from any other foreign people...[405] It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed this sovereignty and framed the Constitution. The duty of the Court is to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted....[407] It is difficult at this day to

realize the state of public opinion in relation to that unfortunate race [Africans], which prevailed in the civilized and enlightened portions or the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nations displays it in a manner too plain to be mistaken. They had for more than a century before been regarded as beings of an inferior order, and altogether unfit with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect:...[420] Congress might...have authorized the naturalization of Indians, because they were aliens and foreigners. But, in their untutored and savage state, no one would have thought of admitting them as citizens in a civilized community. And, moreover, the atrocities they have recently committed, when they were allies of Great Britain in the Revolutionary war, were yet fresh in the recollection of the people of the United States, and they were even guarding themselves against the threatened renewal of Indian hostilities. No one would have supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word was not used with any particular reference to them. Neither was it used with any reference to the African race imported into or born in this country; because Congress had no power to naturalize them, and therefore no there was no necessity for using particular words to exclude them....[426] No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race [African slaves], in the civilized nations of Europe or in this country, should induce this court to give to the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called upon to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption....Any other rule would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty....And upon a careful consideration of the subject, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts;...[432] The act of Congress, upon which the plaintiff relies,

declares that slavery and involuntary servitude, except for punishment for crime, shall be forever prohibited in all the part of the territory ceded by France, under the name Louisiana,...and the difficulty which meets us at the threshold of this part of the enquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority was not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under any one of the United States...[435]...this Government was to be carefully limited in its powers, to exercise no authority beyond those expressly granted by the Constitution, or necessarily to be implied from the language of the instrument, and the objects it was intended to accomplish;...[449] It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character, and assume discretionary or despotic powers, which the Constitution denied to it...[450]...and the Federal Government can exercise no right power over his person or property beyond what the instrument confers, nor lawfully deny any right which it has reserved...And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved. [452] Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding or owning property of this kind in the territory of the United States north of the line mentioned, is not warranted by the Constitution, and is therefore void;...[460] Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory; and, her laws affect and bind all property and persons residing within it...And it is equally true, that no State or nation can affect or bind out of its territory, or persons not residing within it....[480]...to change or to abolish a fundamental principle of the society, must be the act of the society itself——of the *sovereignty*; and that none other can admit to the participation of that high attribute. [483]...each nation should be left in the peaceable enjoyment of that liberty which she inherits from nature...power or weakness does not make any difference. A small republic is no less sovereign than the most powerful kingdom...[484]and no one nation is entitled to dictate a form of government or religion, or a course of internal policy, to another. [485] Sovereignty, independence, and a perfect right of self-government, can signify nothing less than a superiority to and exemption from all claims of extraneous power, however expressly

they may be asserted, and render all attempts to enforce such claims merely attempts at usurpation. [501] But the recognition of a plenary power in Congress to dispose of the public domain, or to organize a Government over it, does not imply a corresponding authority to determine the internal policy, or to adjust the domestic relations, or the persons who may lawfully inhabit the territory in which it is situated....[506] This [the inflation of federal plenary jurisdiction] proceeds from a radical error, which lies at the foundation of much of this discussion. It is, that the Federal Government may lawfully do whatever is not directly prohibited by the Constitution. This would have been a fundamental error, if not amendments to the Constitution had been made. But the final expression of the will of the people of the States, in the 10th amendment, is, that the powers of the Federal Government are limited to grants of the Constitution. [508] In Pollard's Lessee v. Hagan, (3 How., 212,) the court say; "The United States have no constitutional capacity to exercise municipal [509] jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in cases where it is delegated, and the court denies the faculty of the Federal Government to add to its powers by treaty or compact." [513]...a power to make rules and regulations respecting the public domain does not confer a municipal sovereignty over persons and things upon it. [520] The King of Great Britain, by his proclamation of 1763, virtually claimed that the country west of the mountains had been conquered from France, and ceded to the Crown of Great Britain by the treaty of Paris of that year, and he says: "We reserve it under our sovereignty, protection and dominion, for the use of the Indians." This country was conquered from the Crown of Great Britain, and surrendered to the United States by the treaty of peace of 1783.

Fellows v. Denniston, 23 NY 420, 423, 428, 431 (CA)(1861). The nature of the aboriginal title, and that of the State within which the lands lie, has been so often defined by judicial determination that no time need now be spent on it. (*Johnson v. McIntosh,* 8 Wheat., 543; *Fellows v. Ellsworth,* 6 Hill, 546; S.C., 5 Denio, 528.) The Indian nation, in a collective or national capacity, has the right of occupancy of the land, but no power to sell or in any way dispose of it to others, except to the State, or to persons authorized by it to purchase; and the government of the State has the ultimate right of the soil, or title in fee simple, subject to the Indian right of occupancy. The right to purchase the Indian claim, or, in the language usually employed, to extinguish the Indian title, thus existing in the State or in its grantees, is usually called the

right of preemption....If the purchaser acquires no right to interfere with the Indian occupancy, the subject of his purchase is limited to the title of the grantees under the State of Massachusetts; and he acquires nothing more. This, we have seen, is the right of preemption, and perhaps it embraces also a technical fee; but, as it does not embrace the Indian right of occupancy, but expressly excludes it, and that is the only right which the Indians had, it is clear that they are not prejudiced by the tax or by any sale which may take place pursuant to it. The title of the grantees under Massachusetts to these lands, before the extinguishment of the Indian title, subject as it was to the right of possession remaining in the Indians for an indefinite period, was not liable to taxation and sale under the general laws of the State relative to the assessment of taxes.... Each of the three Constitutions successively adopted by the people of the State has contained a provision like that in the first Constitution, which was in these words: "No contracts or purchases for the sale of lands made since the 14th day of October, A.D. 1775, or which may be hereafter made with or of the said Indians, within the limits of this State, shall be binding on the said Indians, or be deemed valid, unless made either under the authority and with the consent of the Legislature of this State."

United States v. Foster, 2 Bissell's 377, 377 (Wisc. Cir. Ct.) (1870). It may be doubted whether this reservation can be sold by the United States in the present condition of the title, even by act of Congress, without the consent of the Indians themselves, but it is certain that it cannot be without an express law; and if the precedents which have always existed in such cases should be followed, it cannot, and ought not to be sold by the Government, until the rights of the Indians are purchased, and with their free consent.

Minter v. Shirley, 3 Miss. 376, 381, 382 (1871). The right to acquire and extinguish their title pertained exclusively to the United States, therefore purchases, made from them separately, or as tribes, were null and void....The several acts of congress, in reference to the survey and sale of the public lands, distinctly keep in view the fact "that the Indian title must first have been extinguished, and acquired by the United States, before individual right to any part of the soil can be derived and vested."

Holden v. Joy, 84 US 211, 244 (1872). Obviously this principle regulated the right conceded by discovery among the discoverers, but it did not affect the rights of those already in possession, either as aboriginal

occupants or as occupants by virtue of a more ancient discovery. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell....Unmistakably their title was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs.

United States v. Washington, 384 F. Supp. 312, 327, 328, 339, 379, 405, 406, 414 (1974), aff'd 520 F. 2nd 676 (9th Cir.)(1975), cert. denied 423 US 1086 (1976). Plaintiffs seek a declaratory judgment pursuant to 28 USC §§2201 and 2202 concerning off reservation treaty fishing rights...Venue is properly laid before this court under 28 USC §1391(b). Jurisdiction is alleged as to all tribes under one or more of the following provisions: 28 USC §§ 1345, 1331, 1343(3) and (4), and 1362.... This Court has previously held and hereby affirms that both of these contentions are without merit and denied. The basis of this ruling is the indisputable and unqualified duty of every federal circuit or trial judge, despite academic and personal misgivings, to enforce and apply every principle of law as it is directly stated in a decision of the United States Supreme Court...The membership of the Stillaguamish Tribe is determined in accordance with the tribal Constitution and Bylaws which have been approved by the tribe but have not been approved by a representative of the Secretary of the Interior. The Stillaguamish Tribe is not recognized as an Indian governmental entity by the federal government. Its enrollment has not been approved by the Secretary of the Interior or his representative and the tribe does not have a reservation.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Edward Vanguilder,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 03-1934(JR)
	:	
United States of America,	:	
	:	
Defendant.	:	

ORDER

For the reasons set out in the accompanying memorandum, defendant's motion to dismiss [6] will be **GRANTED**, and plaintiff's motion for summary judgment will be **DENIED AS MOOT**.

It is **SO ORDERED**.

/s/
JAMES ROBERTSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Edward Vanguilder,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 03-1934(JR)
	:	
United States of America,	:	
	:	
Defendant.	:	

MEMORANDUM

Plaintiff *pro se* Edward VanGuilder claims "aboriginal title" to certain lands, including Governor's Island in New York State. VanGuilder names the United States as the sole defendant in a suit that appears to seek the return of those lands. The United States has moved to dismiss on various jurisdictional grounds. Plaintiff opposes dismissal and has moved for summary judgment.

In analyzing whether this Court has jurisdiction to adjudicate plaintiff's claims, it is important to keep in mind that federal district courts are courts of limited jurisdiction and "possess only that power authorized by Constitution and statute." Kokkonen v. Guardian Life Ins. Co. of Am., 511 US 375, 377 (1994); see also Sheldon v. Sill, 49 US 441, 449 (1850) ("Courts created by statute can have no jurisdiction but what the statute confers."). A related principle is

that the United States, because of its status as a sovereign nation, is immune from suit unless Congress has clearly and unequivocally consented to a court's exercise of jurisdiction. United States v. Mitchell, 445 US 535, 538 (1980). Therefore, this Court does not have jurisdiction to hear a suit against the United States unless Congress has expressly waived sovereignty immunity. Any such waiver is to be strictly construed. Dept. of Army v. Blue Fox, 525 US 255, 261 (1999).

Plaintiff has the burden of establishing that this Court can exercise jurisdiction over his claim. Gibb v. Buck, 307 US 66, 72 (1939). Even construing his *pro se* complaint as broadly as possible, as I must under Hanes v. Kerner, 404 US 519, 520 (1972), I find that plaintiff has failed to satisfy this burden. Plaintiff suggests the jurisdiction of this court may be grounded in 28 USC §§1331, 1343, 1345, 1362, 1391, 2201, or 2202, but not one of these provisions constitutes a valid waiver of sovereignty immunity. Plaintiff must be able to point to a separate statute that waives immunity with respect to the subject matter of h is suit. (For example, a federal employee may bring suit against an agency of United States for gender discrimination under Title VII of the Civil Rights Act of 1964, because that statute expressly waives sovereignty immunity for such claims. 42 USC §2000e-16.) In this case, the Quiet Title Act ("QTA"), 28 USC §2409a, provides the only plausible means of access to federal court. See Block v. N. D.ex rel. Bd, of Univ. & Sch. Lands, 461 us 273, 286 (1983). But to make

out a valid claim under the QTA, plaintiff must state with particularity "the right, title, or interest claimed by the United States." 28 USC §2409a(d). VanGuilder does not, and apparently cannot allege that the United States claims and title or interest in the "disputed" lands. The QTA also has a twelve-year statue of limitations. §2409a(g). Plaintiff does not allege any circumstances that would support a finding that his claims, apparently stemming from treaties signed by various sovereigns during the 17th and 18th Centuries is not time-barred. Nor does plaintiff account for his filing his claim in the District of Columbia: the appropriate venue for a QTA claim is the district in which the property is located. 28 USC §1402(d).

Thus, if this Court has subject matter jurisdiction, it is only by application of the QTA and 28 USC §1331. But, since the QTA manifestly does not apply to this case, plaintiff has failed to state a claim upon which relief may be granted.

An appropriate order accompanies this memorandum.

/s/
JAMES ROBERTSON
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Between:	)	
Edward VanGuilder, Plaintiff,	)	
v.	)	1:03CV01934
United States of America,	)	
Defendant.	)	

NOTICE OF APPEAL

Plaintiff appeals the order dated June 4, 2004, on the ground of the unaddressed constitutional law waiving sovereign immunity.

June 8, 2004.

/s/
Edward VanGuilder, *pro se*
241 Fox Road, P.O. Box 139
North Granville, NY 12854
(518) 642-2448

[submitted *pro se* without oral argument]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Between:	
Edward VanGuilder,	
Appellant,	USCA No. 04–5520
and:	
United States of America,	USDC No. 1:03CV01934(R)
Appellee.	

APPELLANT'S PETITION FOR EN BANC DETERMINATION [FRAP 35(a)(2)]

ON THE ORIGINAL RECORD WITHOUT AN APPENDIX [FRAP 29(f)]

ON AN EXPEDITED BASIS [FRAP 31(a)(2)]

NOTICED TO MASS. & NY [FRAP 44(b)]

The docket in the court below concisely yet fully is responsive to the critical and urgent constitutional question of law alone specifically identified and invited by Thomas, J., in *U.S. v. Lara*, 541 __ (2004).

VanGuilder asks that the Court of Appeals treat the docket in the court below as the appellant's brief and, corre-

spondingly, he waives the right to submit further argument whether written as a brief or delivered orally.

The court below erred by declining jurisdiction to address any of the constitutional legislation and precedents governing both procedure and substance on the ground that the constitutional law is inoperative unless expressly and explicitly implemented by congressional statute.[18]

The appeal consists in a request that the constitutional law be addressed en banc lest the United States cease being a constitutional democracy abiding the rule of law constituted by the doctrine of *stare decisis* and the principle that a constitutional right necessarily implies a judicial remedy. Appendix: Related Case.

The final order or judgment under appeal [19] is dated June 4, 2004, and the notice of appeal was delivered June 10, 2004 [20].

For the purposes of this appeal the fact pleaded in the complaint is taken to be true, namely that VanGuilder holds Mahican title to the Hudson River drainage basin except to the extent such title formally has been purchased and registered in accordance with the constitutional legislation and precedents.

The point of the appeal is to ascertain the law governing the relevance of the facts. If it is the constitutional law identified by VanGuilder and ignored by the USA and the court below VanGuilder alleges he can not lose in the result. If it is the federal law identified by the USA and the court below VanGuilder acknowledges he can not win in the result.

Since the issue is constitutional the standard of review is truth, as the constitutional law is written, rather than reasonableness.

The conclusion is that both the federal and state court systems will best serve the public interest by undertaking the fresh and rigorous analysis invited by Thomas, J.

VanGuilder certifies this petition in lieu of brief and oral argument complies with FRAP 32(a).

June 21, 2004.

/s/
Edward VanGuilder

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5220 **September Term, 2003**
03cv01934

Filed on:

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Filed August 25 2004
CLERK

Edward VanGuilder,
Appellant

v.

United States of America,
Appellee

BEFORE: Ginsberg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers. Tatel, Garland, and Roberts, Circuit Judges

ORDER

Upon consideration of appellant's petition for initial hearing en banc, and in the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark K. Langer, Clerk
BY: /s/
Elizabeth V. Scott
Deputy Clerk/LD

(*pro se*)

Index No. 6079

SUPREME COURT OF NEW YORK
WASHINGTON COUNTY

BETWEEN:

Edward VanGuilder

AND:

State of New York

CLAIM

(1) Mahican title to the Hudson River drainage basin vests in the plaintiff.

THEREFORE plaintiff seeks a declaration that as a matter of constitutional law alone the defendant's constitutional interest therein *prima facie* is "subject to" that title.

June 16, 2004.

Respectfully submitted,

/s/

Edward VanGuilder
241 Fox Road
P.O. Box 139
North Granville, N.Y. 12854
(518) 642-2448

TO: CLERK OF THE COURT
AND TO: GOVERNOR OF NEW YORK
AND TO: ATTORNEY GENERAL OF NEW YORK

(*pro se*)

Index No. 6079

SUPREME COURT OF NEW YORK
WASHINGTON COUNTY

BETWEEN:

Edward VanGuilder

AND:

State of New York

APPLICATION FOR AN ORDER TO SHOW CAUSE

(1) The Supreme Court of New York exercises original and inherent jurisdiction in relation to the plaintiff's title identified in the appended complaint in relation to which the United States District Court for the District of Columbia has declined jurisdiction on the ground of incompetence as a merely statutory court. Appendix "A."

(2) Plaintiff is appealing the said District Court on the ground of the unaddressed constitutional law waiving sovereign immunity. Appendix "B."

(3) By recognizing the right the constitutional law by necessary implication constitutes one or the other or both of the two remedies.

(4) Thomas, J., in *United States v. Lara*, 541 US (2004), on April 19, 2004, invited this critical constitutional question of law alone.

THEREFORE plaintiff seeks the expedited declaratory relief that the defendant's constitutional interest is subject to the plaintiff's title.

June 16, 2004. Respectfully submitted,

/s/
Edward VanGuilder

(*pro se*)

Index No. 6079

SUPREME COURT OF NEW YORK
WASHINGTON COUNTY

BETWEEN:

Edward VanGuilder

AND:

State of New York

AFFIDAVIT IN SUPPORT OF SHOW CAUSE APPLICATION

I, Edward VanGuilder, of North Granville, New York MAKE OATH AND SAY:

1. The fact pleaded is true and in consequence I am entitled by operation of constitutional law alone to the declaratory relief claimed.

/s/
Edward VanGuilder

State of New York
County of Washington
17th June 2004
/s/
Jenny Linda Martelle – 01MA6068020
Notary Public, State of New York
Qualified in Washington County
My Commission Expires 12/24/2005

NEW YORK COURT OF APPEALS
From the Supreme Court of New York

	) *Pro Se & Sua Sponte*
Edward VanGuilder,	)
Plaintiff,	) Notice of
APPLICANT,	) & Case on Appeal
v.	) to the Court of Appeals
	)
State of New York,	) Index No. 6079/2004
Defendant,	) County: Washington
RESPONDENT.	)
	)

(i) This Appeal to the Court of Appeals is being made by Edward VanGuilder, as of right pursuant to Rules of Court of Appeal's practise.

The return date is to be assigned.

(ii) The questions presented to the Court of Appeals for review are:

The court below willfully is being blind to the critical and urgent constitutional question so identified and answered by Mr Justice Thomas in *United States v. Lara,* 541 US _____ (2004) and further justified herein. *Appendices "A", "B", "C" and "D".*

The determinative event is judicial delay tantamount to final disposition.

(iii) The said determinative event is apparent on the face of the record below. *Appendix "E" and Appendix "F".*

(iv) The Court of Appeals has jurisdiction to review this order because of CPLR 5061(b)(2). Furthermore, notice is hereby given to the Solicitor General pursuant to Rule 500.2(d) in view of the fact that 100% of all state statutes are (by operation of the constitutional answer to the constitutional question herein) territorially *ultra vires.*

(v) The Court of Appeals should accept this case for review because Judge Thomas has asked it to (*Appendix "A"*). And because the answer to his constitutional question is obvious and irrebuttable (*Appendix "B"*). And because that answer disposes of the particular case at bar. (*Appendices "C" to "F"*).

(vi) Please expedite pursuant to Rule 500.5(d).

(vii) Please Clerk to requisition originals of Appendices "E" & "F" pursuant to Rule 500.5(a)(1).

(viii) This notice of appeal constitutes the entirety of the case on appeal inclusive of the brief on appeal. Correspondingly oral argument is waived pursuant to Rule 500.5(d)(3).

(ix) Leave from further involvement is requested by me.

The names and addresses of those upon whom these papers were served are:

Solicitor General
State of New York
Department of Law
The Capitol
Albany, NY 12224

Hon. David B. Krogmann
Supreme Court of New
York Judge's Chambers
1340 State Route 9
Lake George, NY 12845

Attorney General
State of New York
The Capitol
Albany, NY 12224-0341

Mark R. Haag
U.S. Department of Justice
Environmental and Natural Resources
General Litigation Section
P.O. Box 23795, L'Enfant Plaza Station
Washington, D.C. 20026-3795

IMPORTANT

YOU MUST ATTACH THE FOLLOWING DOCUMENTS TO THESE PAPERS:

1. THE ORDER AND OPINION SOUGHT TO BE APPEALED;

2. THE ORDER, JUDGMENT OR DETERMINATION OF THE COURT OR AGENCY WHICH WAS APPEALED TO THE APPELLATE DIVISION;

3. YOU MUST SERVE THREE (3) COPIES OF THESE PAPERS ON OPPOSING COUNSEL AND ATTACH PROOF OF SERVICE TO THE PAPERS YOU ARE FILING WITH THE COURT OF APPEALS;

4. ONE COPY OF THE APPELLATE DIVISION RECORD ONM APPEAL OR APPENDIX AND ONE COMPLETE SET OF ALL APPELLATE DIVISION BRIEFS SHOULD BE FILED WITH THESE MOTION PAPERS, BUT NEED NOT BE SERVED ON OPPOSING COUNSEL.

You may attach additional documentation which would be of assistance to the Court.*

*Thank you. I have attached the entire case on appeal in Appendices "A" to "F".

THE STIPULATED ATTACHMENTS

1. There is no order and opinion. This is an appeal against delay that is determinative of rights.

2. CPLR 5061(2)(b) precludes Appellate Division relevance by providing for direct access in the constitutional question situation.

3. One (1) copy hereof has been served by ordinary receipted U.S. mail dispatched this day to the recipients identified above.

4. The record below is reproduced at Appendices "E" & "F". Appendix "F" is the docketed claim, show cause application and supporting affidavit. "E" is the rest of the record.

CONCLUSION

The above Notice & Case on Appeal is hereby Certified Complete and Submitted for Final Disposition this 17th day of September, 2004.

/s/_____
Edward VanGuilder

State of New York

Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 122071095

September 20, 2004

Mr. Edward VanGuilder
P.O. Box 139
North Granville, New York 12854

Dear Mr. VanGuilder:

Your "Notice of Appeal & Case on Appeal" cannot be accepted for filing.

Your papers do not include an appealable paper within the meaning of CPLR 5512(a). Therefore, your papers cannot be treated as initiating an appeal in this Court.

Very truly yours,
/s/
Stuart M. Cohen

JAC/ml
cc: Mark R. Haag, Esq.
Hon. David B. Krogmann
Hon. Eliot Spitzer

Supreme Court, U.S.
FILED
DEC 13 2004
OFFICE OF THE CLERK

(2)

No. 04-671

IN THE
Supreme Court of the United States

VanGuilder v. USA and NY

Petitioner's Supplemental Brief and Consent to *Amicus* Brief Rules 15.8, 18.10 and 37.2(a)

To the U.S. Court of Appeals, District of Columbia And to the New York State Court of Appeals

Edward VanGuilder, *pro se*
241 Fox Road
N. Granville, NY 12854
(518) 642-2448

NEW MATTERS

(1). The NYSC held *Oneida Indian Nation v. County of Oneida*, 44 US 661 (1974) (Oneida I) enlarged or confirmed the enlargement of the federal jurisdiction from the preemption right of purchase, to the plenary jurisdiction to take without Indian consent and accordingly dismissed the show cause application on the ground of non-compliance with federal statute law: **Appendix, 10b**. I appealed on the ground of the conflict with the pre-1871 constitutional law. **Appendix, 12b**. The NYCA invited additional argument: **Appendix, 17b**. I complied. **Appendix, 19b**.

(2). Kanion'ke:haka (People of the Flint or Mohawk) Kaianereh'ko:wa (Great Law) Kanon'ses:neh (Longhouse) moved to file a bill of complaint and an *amicus* brief bearing upon the constitutional question in my petition for *certiorari* 04-671.

(3). A state-wide fraud-in-progress has since come to my knowledge. The perpetrators are the federal and state governments, a set of federally-organized Iroquoian bodies politic subject as

such to federal law on both sides of the USA's border with Canada, a Christianized dissenting group passing itself off as the aboriginal Longhouse government of the Iroquois, and casino promoters. These have colluded and connived to suborn a U.S. District Court into a *per incuriam* finding that both indigenous linguistic families of New York—the Algonkian-speaking Mahicans and the Iroquoian-speaking Six Nations—consented to the "7 Nations Treaty of 1796." The 7th was Abenaki which had no right to cede the Mahican interest in New York, being from Vermont and northwards. The Iroquoian Christian sect at the 1796 event similarly had, and still has no aboriginal interest. Prompted by the fraudulently-induced interim judicial finding that the aboriginal interest was "subject to" federal law, the new fraudulent Treaty is poised to ratify the previous fraudulent Treaty. The new Treaty has been promoted to the Indians as being without prejudice to their aboriginal rights, and to the federal and state governments as finally dispositive of those same rights. The intent is to induce the U.S. Senate to ratify the fraudulently induced Indian consent. The per-

petrators will then rest secure in the apparent impenetrability and durability of the oxymoron identified by Thomas, J.; namely, that Indian sovereignty exists under and therefore is subject to domestic law, rather than the other way round as established in the constitutional era 1633-1871.

CONSENT AND MOTION

Therefore I hereby consent to the application of the *amicus* to intervene and, correspondingly, I seek leave to amend my petition's prayer for relief, to ask this Court to accept my pleadings below for trial under Art. III, §2, rather than to remit them to either or both the USDC and the NYSC under Art. III, §1 as previously requested.

BRIEF

(1). I plead and rely upon the principle of equity *Fraud Vitiates All*.

(2). Before the above new matters came to light I thought that as a matter of *stare decisis* law alone *Cherokee Nation v. Georgia*

of 1831 ("domestic dependent nations") (**Petition, 9a**) precluded the finding by this Court in *Scott v. Sandford,* 19 How. 393 (1857) (**Petition, 15a**) and by Thomas, J., in *Lara* (2004) (**Petition, ii**) that the Indian nations are in any sense "foreign."

(3). Now I see merit in the *amicus' stare decisis* submission that *Cherokee* in 1831 may be read "subject to" *Johnson v. McIntosh,* 8 Wheat. 543 (1823) (**Petition, 8a**) which declared the Indian interest to be "a legal as well as a just claim." As a legal right it must be given a legal remedy. *Cherokee* was based upon this Court's trust the ordinary courts were capable of doing that giving, in spite of the arguable institutional conflict of interest. If *Johnson v. McIntosh* (1823)>*Cherokee Nation v. Georgia* (1831)>*Scott v. Sandford* (1857) (**Petition, 15a**); then *Worcester v. Georgia* (1832) (**Petition, 10a**) arguably tips the balance. It held, in overview, that the constitution did not "enlarge" federal jurisdiction from preemptive to plenary. And therefore when the full jurispruden-

tial accounting is taken this Court may find the *Cherokee* precedent is offset and neutralized by the greater judicial duty to uphold the rule of law safe against the undermining influence of money, politics and *force majeure*.

(4). It is important that this Court resolve the constitutional question of law alone:—of whether the federal jurisdiction is the constitutionally circumscribed preemption power of purchase by treaty with the genuine consent to sell of the authentic aboriginal Indian government still in occupation;—or, alternatively, whether the previously established constitutional jurisdiction of preemption has been enlarged to "sovereign" (*i.e.*, "plenary") status.

(5). All other possible issues (*e.g.*, subject matter jurisdiction, *locus standi* and the relevance and admissibility of evidence) depend upon this threshold issue of the identity of the governing law, be it constitutional or federal. Thomas, J., in *Lara* said (**Petition, ii**) on April 19, 2004:

But until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.

(6). I would respectfully add that it is not just "our cases" but the whole constitutional negotiated settlement process of purchase by treaty that continues to be "haunted" by the unconstitutional assumption that the federal government can conspire with the states and private interests to thwart the constitutional law.

December 8, 2004. **Respectfully submitted,**

/s/
Edward VanGuilder

Appendix

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No. 04-5220

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Edward VanGuilder,

Appellant,

v.

United States of America,

Appellee.

MOTION FOR SUMMARY AFFIRMANCE

The United States herby moves for summary affirmance of the district court's judgment. Summary affirmance is warranted because, as explained below, the district court's judgment is clearly correct and no benefit will be gained from further briefing and argument. *See Egan v. United States Agency for International Development*, ___F.3d___, 2004 WL 1924378 (D.C. Cir. Aug. 31, 2004); *Taxpayers Watchdog, Inc., v. Stanley*, 819 F.2d 294 (D.C. Cir. 1987).

1. Background

This case involves a claim of aboriginal title to certain lands in New York State. In a complaint filed September 15, 2003, (copy attached), plaintiff-Appellant Edward VanGuilder, appearing *pro se*, brought suit against the United States. VanGuilder alleged jurisdiction under 28

U.S.C. 1331, 1343(a)(3) and (4), 1345, 1362, 1391(b), 2201, and 2202 Compl. ¶1. He claimed to have "inherited the Mahican aboriginal title to the reservation in the Indian treaty of April 25, 1724, and to Governor's Island" (Compl. ¶2), and sought a declaration "ejecting adverse possessors from the territory." Compl., prayer for relief at ¶(c). He also sought a declaration that "the defendant's constitutional right of preemption is all the defendant has, and correspondingly its constituents can have, pending the defendant's purchase of the plaintiff's aboriginal title." Compl., prayer for relief at (a)).

VanGuilder moved for summary judgment and the United States moved to dismiss for lack of jurisdiction. In a memorandum opinion and final judgment entered June 4, 2004, the district court (the Honorable James Robertson) granted the government's motion to dismiss. The court held that none of the provisions cited by VanGuilder as a basis for jurisdiction provided the necessary waiver of sovereign immunity. Slip. op at 2. In addition, the court held that while the Quiet Title Act ("QTA"), 28 U.S.C.2409a, provides "the only plausible means of access to federal court" in a case such as this, VanGuilder could not make out a valid claim under that statute because, among other things, VanGuilder did not, and apparently cannot, allege that the United States claims any title or interest in that lands at issue, as required by the QTA. 28 U.S.C. 2409a(d). Slip op. at 2-3.

This appeal followed.

2. Standard of review

This Court's review of the grant of a motion to dismiss is *de novo*. *Wilson v. Pena*, 79 F.3d 154, 160 n. 1 (D.C. Cir. 1996). In ruling on a motion to dismiss, the district court must draw all reasonable inferences in favor for

the plaintiff, and must not dismiss the compliant unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132, 1134 (D.C. Cir. 2002) (citing additional cases). Nevertheless, the burden of establishing jurisdiction is on the party asserting it. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Furthermore, "the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." *Mountain States*, 306 F.3d at 1134-35 (*quoting Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)).

Summary affirmance is appropriate where the appellee demonstrates that the merits of it's claims are so clear as to justify expedited action. *Egan v. United States Agency for International Development*, ___F.3d___, 2004 WL 1924378 (D.C. Cir. Aug. 31, 2004).

3. The district court correctly concluded that there is no applicable waiver of sovereign immunity.

The district court held VanGuilder had failed to satisfy his burden of establishing the existence of the requisite waiver of sovereign immunity. A review of each of the provisions relied on by VanGuilder confirms that this is the case:

-- 28 U.S.C. 1331 is a general grant of federal question subject matter jurisdiction. Where the United States is the defendant, federal subject matter jurisdiction is not enough; there must also be a statutory cause of action through which Congress has waived sovereign immunity. See *Industrial Workers of the World v. Clark*, 385 F.2d 687, 693 n. 10

("general grants of judicial jurisdiction are not usually construed as consent to suit."). Section 1331 does not by itself waive sovereign immunity. *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996); *Neighbors for Rational Development, Inc. v. Norton*, 379 F.3d 945, 960-61 (10th Cir. 2004); *Berman v. United States*, 264 F. 3d 16, 20 (1st Cir. 2001)

-- 28 U.S.C. 1343(a)(3) and (4) provide for jurisdiction in the federal courts in certain civil rights cases. Like 28 U.S.C 1331, section 1343 is a general grant of jurisdiction, not a waiver of sovereign immunity. *Salazar v. Heckler*, 787 F.2d 527, 529-30 (10th Cir. 1986) (citing additional cases).[1]

-- 28 U.S.C. 1345 grants the district court jurisdiction over certain actions brought by the United States. Thus, it does not provide the necessary waiver of sovereign immunity, and is irrelevant to VanGuilder's claim.

-- 28 U.S.C. 1362 grants the district courts jurisdiction over certain civil actions brought by "any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior [.]" This section too is merely a grant of jurisdiction and not a waiver of the United States' sovereign immunity. *Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation*, 792 F.2d 782, 792 (9th Cir. 1986). Further, the provision applies only to federally recognized Indian tribes; it does not apply to individual plaintiffs like VanGuilder. *See, e.g., Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648, 656 (9th Cir 1966).

---

[1] Moreover, section 1343 is not even applicable to VanGuilder's claim. Section 1343(a)(3) only applies to claims to redress deprivations "under color of any State law," and section 1343(a)(4) applies by its terms only to actions "under any Act of Congress providing for the protection of the civil rights, including the right to vote".

-- 28 U.S.C. 1391 establishes federal court venue; it does not address jurisdiction or the waiver of sovereign immunity.

-- Finally, 28 U.S.C. 2201 and 2202 are the Declaratory Judgment Act. That act is not an independent source of jurisdiction, and does not waive the United States' sovereign immunity. *Jarret v. Resor*, 426 F.2d 213, 216 (9th Cir. 1970).

In sum, the district court was correct in holding that none of the statutes cited by VanGuilder waives the United States' sovereign immunity.

4. The district court correctly concluded that VanGuilder cannot claim under the Quiet Title Act.

The QTA provides the "excusive means by which adverse claimants may challenge the United States' title to real property." *Block v. North Dakota*, 461 U.S. 273, 286 (1983). While VanGuilder did not raise the QTA, the district court considered whether VanGuilder might have a claim under QTA, and concluded that he did not. Slip op. at 2-3. That conclusion is plainly correct. The QTA waives that United States' sovereign immunity only with respect to claims involving "real property in which the Unites States claims an interest." 28 U.S.C. 2409a(a). A plaintiff seeking to assert a claim under the QTA must "set forth with particularly * * * the right, title or interest claimed by the United States." 28 U.S.C. 2409a(d). Here, VanGuilder did not allege that the United States has any interest in the lands at issue. To the contrary, he alleged "adverse possession" by virtue of the State of New York's "application of the state's domestic law...." Compl., ¶(3). This defect is fatal to any QTA claim.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be summarily affirmed.

Respectfully submitted,

/s/

MARK R. HAAG
Attorney, Department of justice
Environment & Natural Resources Division
P.O. Box 23795, L'Enfant Station
Washington, D.C. 20026
(202) 514-5391

September, 2004
90-1-0-11083

[Note: Document undated. Certificate of service suggests execution date was September 23, 2004.]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Between:	)
Edward VanGuilder,	)
Appellant,	)
and:	) File No. 04–5220
United States of America,	)
Appellee.	)

VanGuilder's Amended Opposition TO USA'S Motion for Summary Affirmance

The USA's motion willfully blindsides the same constitutional law legislation and precedents as did the District Court in its judgment dated June 4, 2004, and as did the Court of Appeals in its judgment dated August 25, 2004. That law dictates the same constitutional answer as that provided by Thomas, J., in *Lara v. USA*, 541 US (2004): there simply is no constitutional justification for the application of federal legislation (such as the QTA in the opposed motion) to the territory in question. That law establishes that the Amerindian race, the black race descended from slaves, and the white race subsuming all other non-indigenous Americans, have racially-fixed constitutional rights and liabilities until constitutionally amended. *Scott v. Sandford*, 19 How. 393 (1857). Correspondingly the government of the USA is not and can not possibly be "sovereign" vis-à-vis the Indian race upon yet-unpurchased territory; precisely because, the government enjoys a constitutionally delimited jurisdiction to purchase. *Expressio unius personae vel rei, est exclusio alterius.* "The people" alone are sovereign, and they have expressed their sovereignty by the written but willfully blindsided constitutional law that

conflicts with the QTA and all other federal legislation in terms of application to unpurchased territory.

Accompanying please find Decision and Order of Supreme Court of New York dated October 29, 2004, Notice of & Case on Appeal dated November 12, 2004, and Petition for Certiorari dated November 5, 2004. My submission in relation thereto is, comity requires this U.S. Court of Appeals for the District of Columbia to assist the Supreme Court of the United States and the Court of Appeals of New York by giving reasons for judgment which deal overtly with the constitutional question and the Catch-22 whereby both the Federal and the State Court Systems evade jurisdiction by attributing jurisdiction to the other.
November 12, 2004.

/s/
Edward VanGuilder

STATE OF NEW YORK
SUPREME COURT COUNTY OF WASHINGTON

EDWARD VANGUILDER,

Plaintiff,

DECISION AND ORDER

-against-

RJI No. 57-1-2002-0300
Index No. 6079

THE STATE OF NEW YORK,

Defendant.

Appearances:
Edward VanGuilder, Plaintiff, Pro se.

KROGMANN, J.

Application for an Order to Show Cause filed by Plaintiff, Pro Se.

The plaintiff has filed with this Court an "Application for an Order to Show Cause". Annexed thereto along with other filings is found a document entitled "Claim" wherein it appears that the plaintiff is seeking a determination that as a matter of Constitutional Law, the defendant's Constitutional interest in and to the Hudson River drainage basin is subject to Mahican title and therefore vests in the plaintiff.

Upon due consideration of the foregoing and a full review of the additional filing made by the plaintiff who appears pro se in response to the requests of the Court, the plaintiff's Application for an Order to Show Cause is de-

nied based upon a lack of jurisdiction and a failure to state a claim upon which relief may be granted.

With the adoption of the Constitution, Indian relations became the exclusive province of federal law. Oneida Indian Nation v. County of Oneida, 44 US 661 (1974) (Oneida I). It is well established that Indians have a federal common law right to sue to enforce their aboriginal land rights, but such determinations are a matter for the federal courts. In addition, the plaintiff has failed to establish his statutory standing to assert the rights under his "Claim."

The within constitutes the Decision and Order of this Court.

DATED: October 29, 2004

/s/

HON. DAVID B. KROGMANN
JUSTICE OF THE SUPREME COURT

The Court is filing the original decision and order together with the original papers in the appropriate County Clerk's Office.

Distribution:
Edward VanGuilder, Pro Se

File No.

IN THE NEW YORK COURT OF APPEALS
On Appeal from the Supreme Court of New York

	)	*Pro Se* and *Sua Sponte*
Between:	)	
Edward VanGuilder,	)	
APPELLANT,	)	NOTICE OF &
(Plaintiff),	)	CASE ON APPEAL &
Applicant,	)	MOTION
and:	)	
State of New York,	)	Index No.: 6079/2004
APPELLEE,	)	County: Washington
(Defendant),	)	
Respondent.	)	
	)	

(i) This Appeal to the Court of Appeals is being made *pro se* by me Edward VanGuilder as of right pursuant to CPLR 5061(b)(2) and 5512(a) against the attached Decision and Order of the Supreme Court of New York (Washington County) dated October 29, 2004, finally disposing of my show cause application and therefore the *lis* which is restricted to contesting the point of constitutional law settled upon by Krogmann, J., as his basis for disposition.

The return date is to be assigned pursuant to the *sua sponte* procedure which arguably exists for the timely resolution of final dispositions based upon questions of law alone.

(ii) The question presented to the Court of Appeals for review is presented at pp. **(i)** and **(ii)** of the accompanying **Petition for *Certiorari*** dated November 5, 2004. Krogmann, J., purported to refute Thomas, J., in *Lara v. U.S.*, 541 US _____(2004) and the constitutional legislation and precedents reproduced at **pp. 6a-21a**.

(iii) The error of law in the court below is manifest on the face of the record. As anticipated in the said **Petition at p. 4** the alternative to court delay to frustrate the *prima facie* Indian constitutional jurisdiction established at **pp. 6a-21a** is the *per incuriam* leading case in support of the pretense that Federal Law overrides conflicting Constitutional Law:—*Oneida Indian Nation v. County of Oneida*, 44 US 661 (1974) (Oneida I).

For the **Petition**'s reasons at **pp. 4-5** Judge Krogmann's reasons at **page 10b, *infra***, misapprehended the nature of the rule of law:—he held a later Supreme Court case in 1974 overruled the earlier (**Petition pp. 6a-21a**) constitutional law rather than the other way round. *Scott v. Sandford*, 19 How. 393 (1857).

(iv) The Court of Appeals has jurisdiction pursuant to CPLR 5061(b)(2).

(v) Since the U.S. District Court has declined jurisdiction as a statutory court the Hon. Clerk of this Court and this

Court itself have no discretion to refuse this case for review to provide a remedy to give legal force and effect to the said previously established constitutional legislation and precedents at **pp. 6a-21a.** This is a necessary implication of the State court system having inherent, original, general and residual jurisdiction. Otherwise the combined neglect of both the Federal and the State court systems *de facto* to provide a remedy is tantamount to a *de jure* repeal of a constitutional jurisdiction. Where there is a right there is a remedy and, correspondingly, where there is no remedy there is no right. But there *is* a right, namely the Indian constitutional jurisdiction about which this Court has held **(Petition p. 19a)**:

Fellows v. Denniston, 23 NY 420, 423, 428, 431 (CA)(1861). **The nature of the aboriginal title, and that of the State within which the lands lie, has been so often defined by judicial determination that no time need now be spent on it. (*Johnson v. McIntosh,* 8 Wheat., 543; *Fellows v. Ellsworth,* 6 Hill, 546; S.C., 5 Denio, 528.) The Indian nation, in a collective or national capacity, has the right of occupancy of the land, but no power to sell or in any way dispose of it to others, except to the State, or to persons authorized by it to purchase; and the government of the State has the ultimate right of the soil, or title in fee simple, subject to the Indian right of occupancy. The right to purchase the Indian claim, or, in the language usually employed, to extinguish the Indian title, thus existing in the State or in its grantees, is usually called the right of preemption....If the purchaser acquires no right to interfere with the Indian occupancy, the subject of his purchase**

is limited to the title of the grantees under the State of Massachusetts; and he acquires nothing more. This, we have seen, is the right of preemption, and perhaps it embraces also a technical fee; but, as it does not embrace the Indian right of occupancy, but expressly excludes it, and that is the only right which the Indians had, it is clear that they are not prejudiced by the tax or by any sale which may take place pursuant to it. The title of the grantees under Massachusetts to these lands, before the extinguishment of the Indian title, subject as it was to the right of possession remaining in the Indians for an indefinite period, was not liable to taxation and sale under the general laws of the State relative to the assessment of taxes.... Each of the three Constitutions successively adopted by the people of the State has contained a provision like that in the first Constitution, which was in these words: "No contracts or purchases for the sale of lands made since the 14th day of October, A.D. 1775, or which may be hereafter made with or of the said Indians, within the limits of this State, shall be binding on the said Indians, or be deemed valid, unless made either under the authority and with the consent of the Legislature of this State."

(vi) Please expedite pursuant to Rule 500.5(d).

(vii) Please Clerk to requisition originals pursuant to Rule 500(a)(1).

(viii) This notice of appeal constitutes the entirety of the case on appeal inclusive of the brief on appeal. Correspondingly I hereby waive oral argument pursuant to Rule 500.5(d)(3).

(ix) Leave from further involvement is requested by me.

The names and addresses of those upon whom these papers were served are:

- Solicitor General, State of New York, The Capitol, Albany, N.Y. 12224
- Attorney General, State of New York, The Capitol, Albany, N.Y. 12224-0341
- Solicitor General, United States of America, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001
- Attorney General, United States of America, c/o Counsel Mark Haag, Appellate Section, Environment and Natural Resources Division, U.S. Dept. of Justice, Box 7397 – L'Enfant Plaza Station, Washington, D.C. 20026

CONCLUSION

The above Notice of & Case on Appeal is hereby Certified Complete and Submitted for Final Disposition this 12th day of November, 2004.

s/_____

Edward VanGuilder, (*pro se*)

State of New York

Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

December 1, 2004

Mr. Edward VanGuilder
P.O. Box 139
North Granville, New York 12854

Dear Mr. VanGuilder:

The Court has received your Rule 500.2 jurisdictional statement and will examine its subject matter jurisdiction sua sponte with respect to whether the order appealed from finally determines the action within the meaning of the Constitution, and whether any jurisdictional basis exists for a direct appeal as of right from an order of Supreme Court. This examination of jurisdiction shall not preclude the Court from addressing any jurisdictional concerns in the future.

This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange for the execution of a stipulation signed by all counsel consenting to a dismissal of the appeal (see section 500.16 of the Court's Rules of Practice) and transmit that paper to my of-

fice. If a stipulation is forthcoming, please inform the Clerk's office immediately.

On the other hand, if you wish to persevere in the appeal, you should serve and file within ten days after this letter's date your comments in letter format justifying the retention if subject matter jurisdiction. Also please enclose a copy of each brief filed by each party in the Appellate Division, as well as a copy of the record on appeal or appendix filed in that court.

By copy of this letter, your adversary is likewise afforded the opportunity to comment in writing on the subject matter jurisdiction within the same ten day period after this letter's date.

The times within which briefs on the merits must be filed are held in abeyance during the pendency of this jurisdictional inquiry. If this sua sponte inquiry is terminated by the Court, the Clerk will notify counsel in writing and set a new schedule for the perfecting of the appeal. If you have any questions regarding this letter, you may contact the James Costello (518-455-7702) or Susan Dautel (518-455-7701).

Very truly yours,
/s/
Stuart M. Cohen

SSD/ml
cc: Hon. Eliot Spitzer

Edward VanGuilder
241 Fox Road
P.O. Box 139
North Granville, NY 12854
(518) 642-2448

December 6, 2004

Stuart M. Cohen, B.A., J.D.
CLERK OF THE COURT OF APPEALS
For the State of New York
20 Eagle Street
Albany, NY 12207-1095

Dear Hon. Clerk of the Court:

Re: *VanGuilder v. NY.* Index 6079/2004
And: Retention of Subject Matter Jurisdiction

Pursuant to your letter dated December 1, 2004, I repeat and rely upon my Notice of & Case on Appeal to establish no facts rationally can be addressed by any court before the governing law is settled because, as a matter of law alone, it determines court jurisdiction, *locus standi*, the burden of proof and the relevance of all questions of fact and equity.

This Court applied the constitutional law without regard for federal or state law in *Fellows v. Denniston*, 23 NY 420, 423, 428, 431 (1861). According to the Court Below this Court's former jurisdiction subsequently was repealed by *Oneida Indian Nation v. County of Oneida*, 44 US 661 (1974) (Oneida I). I do not yet understand and I want to try understand how that can be possible in the ab-

sence of a duly processed constitutional amendment within the meaning of *Scott v. Sandford*, 19 How. 393 (1857). I realize the Court Below merely re-iterated conventional wisdom but my question of law alone is whether the conventional wisdom is constitutional or, alternatively, skewed by 16 Stat. 566 (1871) as held by Thomas, J., in *Lara v. U.S.*, 541 US _ (2004).

Sincerely,

/s/ _____
Edward VanGuilder
Appellant (Plaintiff) Applicant
pro se

Encl.
cc:

- Solicitor General, United States of America, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001
- Attorney General, United States of America, c/o Counsel Mark Haag, Appellate Section, Environment and Natural Resources Division, U.S. Dept. of Justice, Box 7397 – L'Enfant Plaza Station, Washington, D.C. 20026
- Solicitor General, State of New York, The Capitol, Albany, N.Y. 12224
- Attorney General, State of New York, The Capitol, Albany, N.Y. 12224-0341

From: Donna Roundpoint
[mail to: droundpoint@akwesasne.com]
Sent: Fri 8/6/2004 2:03 PM
To: James T. Meggesto
Cc: sabenedict@akwesasne.com
Subject: Council's question on release clause

A question put forward by Chief Mike Mitchell is: "Is it possible to go to court on the issue of the release clause alone, to see if we can get a ruling? And if the decision is favorable, then negotiations can resume."

The Council would like the answer to this question by Monday, so they can discuss it on Tuesday.

Thanks.

Donna

Subject: RE: Council's question on release clause
Date: Mon, 9 Aug 2004 11:33:56-0400
From: "James T. Meggesto"
<james.meggesto@sonosky.com>
To: "Donna Roundpoint" <droundpoint@akwesasne.com>
CC: "Salli Benedict" <sabenedict@akwesasne.com>

Donna, Salli:

I spoke with Harry about this and we both agree that it is not possible to go to court to get a ruling on whether it is reasonable for the state to want a global release as part of any settlement. A court would respond by stating that if the Mohawks did not want a full release, they do not have to settle.

Also, a court would also not make a ruling on what claims could be made under present law. That would be

called an "advisory opinion" and courts do not make advisory opinions because it is unconstitutional.

Salli also asked an additional question: If the Mohawks settle and withdraw their petition for judicial review of the FERC proceedings, can individual Mohawks continue to challenge the license?

The answer is no, because only the Mohawk governments intervened before FERC, and sought rehearing of the license order, only the Mohawk governments may petition for judicial review.

However, an individual has standing to challenge whether NYPA is violating a condition or term of its license.

I can continue to be reached on my cell phone (703) 946-6950 if you need anything further.

Best regards,

James Meggesto

Subject: Draft of Settlement Counter Offer
Date: Mon, 09 Aug 2004 11:39:21 -0400
From: Jim Ransom <jransom@srmt-nsn.gov>
To: "kan>>'Kanatiiosh Gray'" <kanatiiosh@aol.com>, Alex Page <apage@indianlaw.org>, "'James Meggesto'" <james.meggesto@sonosky.com>, Michele Mitchel <mmitchel@srmt-nsn,gov>, "Marsha K. Schmidt" <mks@srmt@mac.com>, Barbara Lazore <blazore@srmt-nsn,gov>, Margaret Terrance <mterrance@srmt-nsn,gov>, Emily Lauzon <elauzon@srmt-nsn,gov>, Rita Swamp <rswamp@srmt-nsn,gov>, "Ron LaFrance, Jr." <rlafrance@srmt-nsn,gov>

She:kon Everyone:

Attached for your approval to send to the State is the draft of the Settlement counter offer that I am hoping we can send this week. Please note that I still have not received the elevation language (C.3) from the State and have reserved comment on it until we see it. I have made the following changes to the settlement offer after receiving feedback:

1. On C.5, I added clarifying language to make sure the conveyance to us was by voluntary transfer, so that the change is consistent with C.1.

2. On C.6, I have broadened the lands to include our original Aboriginal territories instead of limiting ourselves to St. Lawrence and Franklin Counties. I have done this for two reasons. First, the broadness would satisfy our interest in creating a scenario whereby we would be able to acquire lands up to the 9 million acre Aboriginal claim that has been spoken about. Second, the language is broad so that it includes allowing the Tribe acquiring land in Sullivan County for gaming purposes. This would address a major concern the United States has and a major concern that the State has as well about the Sullivan County land acquisition for gaming purposes. By wording the way we have, it doesn't distinguish what purposes the land acquisitions will be for in the future, acquiring gaming lands is already an available option under the Part 151 process. Thus, it keeps gaming interests of the Tribe separate from land claims. The only way that the State and United States would support this language is if the Tribe can convince them that this is the only way to address their concerns related to Sullivan County. If we are successful, then we all benefit in that future generations will be able to make land purchase beyond this claim.

3. On C.12, I have shortened the description to just public facilities which is how the State described what the section would apply to.

Finally, Michelle sent language out to our respective lawyers on arbitration and limited waiver of sovereign immunity. We have not received a response to this language.

Comments please.

Jim

Confidential 08/09/04

Proposed Land Claims Settlement Between the State of New York and the Akwesasne Mohawks

Explanations/ Rationale

I. Understanding

1. It is the understanding of the State of New York (the "State") and the tribal plaintiffs in Civil Action Nos. 82-CV-1114, and 89-CV-829 (the "Akwesasne Mohawks) (collectively, the "Parties") that it would be mutually beneficial to resolve all Akwesasne Mohawk land claims within New York State.

2. All references to state or federal law shall mean the laws as they exist and are interpreted by state or federal courts from time to time and shall include all future changes, amendments and revisions thereto unless otherwise stated.

II. Scope of the Agreement

A. RELEASE. Except as otherwise provided in this settlement agreement, the Akwesasne Mohawks hereby release and forever discharge the State, its political subdivisions, its citizens, inhabitants, the Power Authority of the State of New York (the "Power Authority"), and any successors in interest, of and from any claim which could be brought under federal or state law at the time of the execution of this settlement agreement to land or interest in New York State.

Additional language that will ensure all Mohawk parties will participate in this settlement agreement.

1. Nothing in this agreement shall alter any treaty, statutory, contractual or aboriginal hunting, harvesting, fishing, trapping and/or gathering rights that the Akwesasne Mohawks may have; provided, however, that nothing in this settlement agreement shall be construed as diminishing, recognizing the existing the existence of, creating or conferring any such rights.

Clarification.

B. Monetary Settlement

1. The State and the United States shall each pay one half the sum of

thirty million dollars, to be paid in five equal annual payments commencing within ninety days of the effective date of settlement. Further, the Parties agree that the Power Authority shall pay the sum of two million dollars per year for thirty-five years commencing within ninety days of the effective date of this settlement agreement. The payments shall be exempt from federal or state taxation.

2. None of the payments, funds, assets or distributions set forth herein and none of the interest earned or income received on the same shall be subject to levy, execution, forfeiture, garnishment, lien, encumbrance, or seizure. None of the payments, funds, assets or distributions set forth herein and none of the interest earned or income received on the same shall at any time be used as a basis for denying or reducing funds to the Akwesasne Mohawks under any Federal, State or local program nor shall the same be deemed to be taxable, and such transfers shall not be deemed taxable events.

C. Land

Clarification to address voluntary transfer of land to the Akwesasne Mohawks.

1. Upon the effective date of the settlement, the Akwesasne Mohawks may acquire the following lands by purchase of parcels from willing sellers at fair market value or by voluntary transfer, with the understanding that boundaries for eligible parcels shall be drawn completely around such parcels so that the property may be acquired without being subdivided:

a. Land located in the Hogansburg-Bombay Triangle, as shown as "A" on the annexed map.

b. Up to 1300 acres of land ~~Land~~ in the area in the Town of Fort Covington marked as "B" on the annexed map.

c. ~~Land located in the area of the Town of Covington marked as "E" on the attached map; provided, however, that lands acquired by the Akwesasne Mohawks within such area "E" shall be held in fee unless accepted in and, absent the prior written consent of both the County and Town in which such land is located shall not be taken into trust status by the Secretary of the Inte-~~

~~rior pursuant to 25 Code of Federal Regulations Part 151. United Statesfor any purpose or otherwise considered Indian country or subject to restriction by the United States against alienation.~~

Upon further consideration, the Akwesasne Mohawks believe the community is more likely to accept the return of lands in area "E" by the process originally outlined in the MOU.

The Akwesasne Mohawks may acquire additional lands located within the claim area marked "E" on the annexed map either by purchase from willing sellers or by transfer from Akwesasne Mohawks or by voluntary transfer; provided, however, that before any such acquisition, the Akwesasne Mohawks will obtain the prior written concurrence of both the County and Town in which such land is located, such concurrence which shall not be unreasonably withheld. When such land is acquired it shall have the same status and be subject to administration by the Akwesasne Mohawks as set forth in C.5 of this settlement agreement.

***

Clarification to address voluntary transfer of land to the Ak-

5. Except as otherwise provided herein, when such lands are purchased from willing sellers or conveyed by the Power Authority to the Akwesasne Mohawks, or land

wesasne Mohawks.

conveyed to the Akwesasne Mohawks by voluntary transfer, they shall become Indian reservation land and be considered Indian country as a matter of federal law, will be subject to federal restrictions against alienation and will enjoy all of the rights and immunities, specifically including but not limited to tax immunities, attributed to Indian Reservation lands and Indian country.

Clarifying language to ensure that the Akwesasne Mohawks can use the Part 151 process to purchase lands after this settlement that are outside of the claim area and to address if the Part 151 process is changed in the future.

6. Lands within the original Aboriginal territories of the Akwesasne Mohawks acquired outside of the areas described in the preceding paragraphs of this section shall be held in fee by the Akwesasne Mohawks ~~and absent prior consultation of the State shall not be taken into trust for any purpose by the United States or otherwise considered Indian country or subject to restrictions by the United States against alienation.~~ unless accepted into trust under 25 CFR Part 151 or other federal legal procedures.

***

G. Settlement Legislation

The land claim settlement

described herein shall take effect upon the enactment of such federal and state legislation as is mutually acceptable to the Parties to effectuate the terms of this settlement agreement and, further, upon the execution of appropriate releases and other documents that may be necessary. The federal legislation ratifying the settlement agreement shall provide for resolution of disputes between or among the Parties by arbitration, with arbitration decisions to be subject to enforcement and/or vacatur in the United States District Court in accordance with the Federal Arbitration Act, 9 USC §1, *et seq.* and provide for federal court jurisdiction over actions brought to enforce or review decision issued in such arbitration proceedings.

[Insert express waivers of sovereign immunity.]

Release:

Except as otherwise provided in this agreement, the Akwesasne Mohawks hereby release and forever discharge the state, its political subdivisions, its citizens, inhabitants, the Power Authority of the State of New York (the "Power Authority"),

and any successors in interest, of and from any claim to land or interest in land in New York State, all known debts, actions, causes of action, suits and claims that have been brought in Civil Action Nos. 82-CV-783, 82-CV-1114, and 89-CV-829, and the Plaintiffs release the State of New York, its citizens, inhabitants and any successors in interest forever from such claims.

MOU Quitclaim Language

II. Land Claim Settlement....

Option 3

(a) In consideration of the benefits of this Settlement Agreement and other valuable consideration, the Plaintiffs disclaim, relinquish, and agree to the permanent extinguishment of all claims to right, interest and title of any kind in the lands described as follows:

(i) *Description of Lands to be included*

(b) The ratifying legislation shall provide for the extinguishment of the Plaintiff's claims with the following language:

(i) Congress declares that, except for the rights and interests recognized and protected in this Act, all Mohawk

claims to right, title and interest of any kind in and to the lands described in this section (a)(i) any part thereof, and property interests therein, as well as related boundary, survey, and trespass claims, therein, are hereby permanently extinguished.

(ii) Congress declares that any Mohawk claims to right, title and interest in and to Barnhart, Long Sault, and Croil Islands, [except for the rights and interests to the island recognized and protected in this Act], as well as related boundary, survey and trespass claims, therein, are hereby permanently extinguished.

(iii) As provided in this Section of the Settlement Agreement, the Plaintiffs have agreed to the relinquishment and extinguishment of those claims, rights, titles and interests extinguished pursuant to this section.

(iv) The recognition of Mohawk rights and interests in this Act constitutes consideration for the Mohawks agreement to the extinguishment of the Mohawks' claims in this section,

and it is the intent of Congress that those rights and interests may only be diminished by a future Act of Congress specifically authorizing such diminishment of such rights, with specific reference to this Act.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS, *et al.*,

Plaintiffs,

v.

5:82-CV-0783 (Lead)
5:82-CV-1114 (Member)
5:89-CV-0829 (Member)

THE STATE OF NEW YORK, *et al.*,

Defendants.

APPEARANCES:	OF COUNSEL:
HOBBS STRAUS DEAN & WALKER Attorneys for Plaintiff St. Regis Mohawk Tribe, by the St. Regis Mohawk Tribal Council (5:89-CV-829 & 5:82-CV-783) 2120 L Street, N.W., Suite 700 Washington, DC 20037	MARSHA J. SCHMIDT, ESQ.
SONOSKY CHAMBERS LAW FIRM Attorneys for Plaintiffs Canadian St. Regis Band of Mohawk Indians (5:82-CV-1114 & 5:82-CV-783) 1424 K Street, N.W., Suite 600 Washington, DC 20005	JAMES T. MAGGESTO, ESQ. ARTHUR LAZARUS, ESQ.
INDIAN LAW RESOURCE CENTER Attorneys for Plaintiffs People of	STEVEN M. TULLBERG, ESQ. VANESSA J. JIMENEZ,

the Longhouse at Akwesasne by Mohawk Nation Counsel of Chiefs (5:89-CV-829) 601 E Street, S.E. Washington, DC 20003	ESQ.
U.S. DEPARTMENT OF JUSTICE Environmental and Natural Resources Division Indian Resources Section Attorney for Plaintiff-Intervenor United States of America (5:89-CV-829, 5:82-CV-783 & 5:82-CV-1114) L'Enfant Plaza Station P.O. Box 44378 Washington, DC 20026-4378	JAMES B. COONEY, ESQ. DAVID MORAN, ESQ.
HISCOOK & BARKLAY, LLP Attorneys for Defendants County of St. Lawrence, County of Franklin, Village of Massena, Town of Bombay, Town and Village of Fort Covington, Key Bank of Northern New York, N.A., Nationwide Mutual Insurance Co., Niagara Mohawk Power Co., Marine Midland Properties Corporation, Walsh Realty Corporation, and Canadian National Railways (5:89-CV-829, 5:82-CV-783 & 5:82-CV-1114) P.O. Box 4878	JUDITH M. SAYLES, ESQ. ALAN R. PETERMAN, ESQ.

Syracuse, NY 13221-4878

HON. ELIOT L. SPITZER
Attorney for the State of New York
Attorney for State Defendants
(5:89-CV-829, 5:82-CV-783 & 5:82-CV-1114)
The Capitol
Albany, NY 12224

DAVID B. ROBERTS, ESQ.
CHRISTOPHER W. HALL, ESQ.

MANATT, PHELPS & PHILIPS, LLP
Attorneys for the Defendant New York Power Authority
(5:89-CV-829 & 5:82-CV-1114)
1675 Broadway, 27th Floor
New York, NY 10019

O. PETER SHERWOOD, ESQ.

NEAL P. MCCURN, Senior United States District Judge
GEORGE H. LOWE, United States Magistrate Judge

ORDER

Pursuant to the teleconference held by the undersigned on November 3, 2004, it is hereby **ORDERED** that the docket entry for Plaintiff St. Regis Mohawk Tribe's Motion for an Injunction Pursuant to the All Writs Act (Dkt. No. 332) shall be entered as follows:

(1) responses are due on or before **NOVEMBER 10, 2004;**

(2) any party that decides not to file a response must so advise the Court in writing on or before **NOVEMBER 10, 2004;**

(3) no replies to the responses will be permitted; and

(4) the motion is set for **NOVEMBER 12, 2004** at **1:00 P.M.** in Syracuse before the undersigned; and it is further

ORDERED that the parties must report to the undersigned in writing, either individually or jointly, on or before **DECEMBER 1, 2004**, as to the outcome of the November 27, 2004 processes concerning approval or rejection of the proposed settlement agreement; if the proposed settlement agreement is rejected, a teleconference to discuss scheduling issues shall be held on **DECEMBER 7, 2004** at **8:30 A.M.**—Ms. Schmidt to initiate the call to 315-234-8618 using AT&T or any other teleconference service, and counsel to give Ms. Schmidt timely notification of the telephone numbers at which they can be reached.

Dated: November 3, 2004
Syracuse, New York

/s/
George H. Lowe
United States Magistrate Judge

(4)

No. 04-671

IN THE

Supreme Court of the United States

VanGuilder v. USA and NY

Petitioner's 2nd Supplemental Brief
Rules 15.8, 18.10 and 37.2(a)

To the U.S. Court of Appeals, District of Columbia
And to the New York State Court of Appeals

Edward VanGuilder, *pro se*
241 Fox Road
N. Granville, NY 12854
(518) 642-2448

NEW MATTERS

(1). The NYCA dismissed the appeal. Appendix, p. 2a.

BRIEF

(1). I repeat that I rely upon the principle of equity *Fraud Vitiates All* and in relation thereto I welcome the evidence presented by the reasons for judgment of the Court of Appeals for the State of New York, Hon. Judith S. Kaye, Chief Justice, presiding. Appendix, 2a.

(2). The legislative authorities cited by Kaye, CJ, prove the opposite to the proposition of law for which she contended. Appendix, 3a.

(3). This may be the reason the U.S. Constitution provides for the U.S. Supreme Court itself to perform the first instance adjudicative function in relation to competing quasi-sovereignties. *Constitution*, Art. III, §2, cl. 1, 4 and 5.

(4). Prior to Independence that jurisdiction vested in the Judicial Committee of the Privy Council.[1]

(5) Until now it has not been settled what happened to that previously established jurisdiction upon the transition of the crown's former jurisdictions to the People of the United States. Apparently they assigned it to the Supreme Court of the United States. Really there is no place else it rationally could have gone. Continuity rather than lapse is presumed by operation of law alone, precisely because the rule of law abhors a vacuum which risks anarchy and physical self-defence for lack of a rule of law remedy.

January 10, 2005. **Respectfully submitted,**

/s/
Edward VanGuilder

---

[1] Full particulars are in Joseph H. Smith, *Appeals to the Privy Council from the American Plantations,* New York, Columbia University Press, 1950.

Appendix

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VanGuilder v. NY

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State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth day of January 2005.

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 1184 SSD 78

Edward VanGuilder,

Appellant,

v.

State of New York,

Respondent..

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that it does not lie (see, NY Const. art VI, §3(b); CPLR 5601).

/s/

Stuart M. Cohen
Clerk of the Court

NY Constitution

Article VI, §3(b). Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;...In civil cases and proceedings as follows:...(2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

Civil Practice Law and Rules (CPLR)

5601. Appeals to the court of appeals as of right....(b) Constitutional grounds.

Supreme Court, U.S.
FILED
JAN 10 2005
OFFICE OF THE CLERK

(3)

No. 04-671

IN THE
Supreme Court of the United States

VanGuilder v. USA and NY

Petition for Rehearing
Rule 44(2)

To the U.S. Court of Appeals, District of Columbia
And to the New York State Court of Appeals

Edward VanGuilder, *pro se*
241 Fox Road
N. Granville, NY 12854
(518) 642-2448

GROUNDS

(1). My petition went to judicial conference January 7, 2005. Today's Order List records the fact of denial.

(2). Until today there was not yet available a final decision of the NYCA as well as of the USCA. *Certiorari* may have been denied for lack thereof. Appendix 2a. Pet's 2nd Supp. Brief E.V

(3). Secondly, the Court's administration knowingly withheld from the said conference evidence of its own *ultra vires* and *mala fides* abuse of the administration's unfettered discretion to reject. Rule 1(1). Appendix 3a-10a.

BOOKLET APPENDICES

Petitioner's 2nd Supplemental Petition	1/10/05
Motion of Petitioner	1/3/05
Amicus Application	12/1/04
Bill of Complaint Motion	12/1/04

BRIEF

(1). This Court labors under a positive duty to apprehend the *de facto* negation in practice of the *de jure* Indian sovereignty.

(2). The subornation of the bench by the administration's suppression of evidence and argument demonstrates the *modus operandi* for the genocide by chicanery of the Indian race.

(3). The administration places itself above the Constitutional Law by suppressing its exposition.

(4). The root of this genocide by chicanery in North America in abrogation of the rule of law was identified by Columbia University Law Professor Joseph H. Smith, *Appeals to the Privy Council form the American Plantations,* New York, Columbia University Press, 1950, pp. 417-25, 461-63:

> **This [*Mohegan Indians v. Connecticut*] case affords an extreme example of the difficulties faced in enforcing an unpopular adjudication against a colony enjoying quasi-sovereignty. Yet**

the cause is distinguishable in its difficulties in that one party, the Mohegans, although juristically regarded as sovereign, did not enjoy *de facto* sovereignty.

(5). The rule of law does not exist if the Indians' *de jure* sovereignty continues as it has *de facto* to be unenforceable due to the fact court administrators upon procedural pretexts preempt constitutionally critical substance from judicial resolution, with arguably genocidal consequence, in utter abrogation of the Rule of Law

(6). This Court held in *Scott v. Sandford,* 19 How. 393 (1857) (Petition Appendix 15a), that in 1789 the *Constitution* recognized 3 differing qualities of citizenship based specifically upon race. The African race in North America had inferior constitutional status. This Court held that could not be changed by the Federal Government but only in virtue of a Constitutional Amendment. The express and explicit Reason for Judgment was the Federal Government constitutionally has

only enumerated power rather than sovereign (or "plenary") residual jurisdiction to do what ever else it wants (especially to Indian sovereigntists). Absolutely, the Federal Government is not sovereign in relation to the previously vested constitutional status attached to any of the 3 founding races.

(7). This Court explained that in contrast with the Black race the Indian race occupied a superior rather than an inferior constitutional position. Since the Indians were here first and organized under their own Indian Governments operating "subject to" their own Indian Constitutions, therefore by operation of International and Constitutional Law alone the Indian Constitution the *Kaianereh'ko:wa* and my Mahican Constitution still govern virtually the whole of New York State, inclusive of the lands unconstitutionally to be set apart for casino purposes by settling contrived litigation between the Federal Government and its puppet "Indian" Governments organized under and "subject to" Federal Law.

(8). Every time this Court lets in another such contrived case, and they are legion, the end of the genocide is postponed.

(9). The Constitutional Question asked and answered by Thomas, J., in *U.S. v. Lara,* 541 US ____ (2004) (Petition pp. i and ii), released my sovereign People, and the sovereign People of our ally the sovereign Kanion'ke:haka Kanon'ses:neh under the *Kaianereh'ko:wa,* from the terror of the genocide. We cannot believe he would let us be put back under. He can not have been informed. We have to believe that. He is the only hope.

CONCLUSION

(1). *Certiorari* is justified.

January 10, 2005. **Respectfully submitted,**

/s/_____
Edward VanGuilder

Appendix

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VanGuilder v. USA and NY

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Kanion'ke:haka Kaianereh'ko:wa Kanon'ses:neh
Route 14, P.O. Box 1016, Akwesasne, Kanion'ke:haka [13655]TDC (518)
phone 358-6012 and fax 358-6007

December 1, 2004

Hon. William K. Suter
Office of the Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543-0001

Attention: Ann McCamey, Case Analyst

Dear Hon. Clerk of the Court:

- **Re: *Kahentinetha v. USA and NY,* Application for Leave to File Bill of Complaint**
- **And Re: *Amicus* Brief of Kahentinetha in *VanGuilder v. USA,* No. 04-671.**

Enclosed for filing please find (originals plus 40 copies of each of) the above, the affidavits of service and the $600 court fee.

Kanion'ke:haka
Kaianereh'ko:wa
Kanon'ses:neh
pro se

per: /s/
Kahentinetha
/s/
Io ke ron onh

Kanion'ke:haka Kaianereh'ko:wa Kanon'ses:neh
Route 14, P.O. Box 1016, Akwesasne, Kanion'ke:haka [13655]TDC (518)
phone 358-6012 and fax 358-6007

December 13, 2004

Hon. William K. Suter
Office of the Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543-0001

Attention: Ann McCamey, Case Analyst
Re: *Kanion'ke:haka v. NY and USA*, Motion for Leave to File Bill of a Complaint No. 04-(*not assigned*); and,
Re: *Amicus* Brief of (Name) in right of Kaienerekowa in *VanGuilder v. USA*, Petition for *Certiorari* No. 04-671.

Dear Hon. Clerk of the Court:

Earlier today we received in the mail copies of a two page letter with accompanying one page waiver to you from the AGNY. The said waiver has no court file number and is between us and NY and USA which suggests the waiver relates to our motion for leave to file a bill of complaint, the first file captioned above. But then the waiver goes on to describe us as "(Petitioner)" which we are not, anywhere; and the operative clause waives the right to respond to "the petition for certiorari...." Our question is, to which if either Supreme Court file above does the waiver relate?

Yours very truly,

/s/
Kahentinetha and/or Io ke ron onh

Encl.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

December 27, 2004.

Kahentinetha
Route 14, P.O. Box 1016
Akwesasne, NY 13655

Dear Mr. Kahentinetha:

The *amicus* brief in the above entitled-case was postmarked December 4, 2004 and received and is herewith returned for the following reason(s):

You must be a member of the Supreme Court Bar to file a document in this Court. See Rule 9 of the Supreme Court Rules. Only parties to a case may file "pro se".

Written consent from all the parties is required to file an *amicus* brief. If you cannot obtain consent you must file a motion for leave to file an *amicus curiae* brief with the Court. See Rule 37 of the Supreme Court Rules.

A sample amicus brief is enclosed. Pursuant to Rule 37, the brief must include (page 1) Interest of the amicus, Summary of the argument, Argument, and Conclusion. The conference date on which the case 04-671 will be considered is January 7, 2004 [sic]. Should you wish to resubmit an amicus brief, it must be received before that date.

Thank you for your interest. You may follow the progress of the case on our website, www.supremecourtus.gov

Sincerely,
William K. Sutter, Clerk
By:/s/_____
E. Kathleen Tycz
(202) 479-2923

Enclosures

Kanion'ke:haka Kaianereh'ko:wa Kanon'ses:neh
Route 14, P.O. Box 1016, Akwesasne, Kanion'ke:haka [13655]TDC (518)
phone 358-6012 and fax 358-6007

BY OVERNIGHT COURIER ASAP: LIFE AND DEATH ISSUE

December 31, 2004

Hon. William K. Suter
Office of the Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543-0001

Attention: E. Kathleen Tycz

Re: *Kahentinetha v. USA and NY,* Application for Leave to File Bill of Complaint
And Re: *Amicus* Brief of Kahentinetha in *VanGuilder v. USA,* NO. 04-671.

Dear Hon. Clerk of the Court:

Earlier today we received short notice from your office by letter dated December 27, 2004, acknowledging ours postmarked December 4th and informing us we only have until January 7th to re-submit in order to be considered in relation to Petition for *Certiorari* No. 04-671 since,

> **"Pursuant to Rule 37,** [sub-rule not identified] **the brief must include (page 1) Interest of the amicus, Summary of argument, Argument, and Conclusion."**

The brief you rejected consists in those headings; prefaced only by the *Notice of Motion* stipulated for by Rule **37.2**. Since **Rule 37.6** stipulates for the *Disclosure* statement on page 1, therefore the rest of the headings could not physically fit on page 1. They are on pages 2 and 3. The conference will be improperly and prejudicially convened in relation to the petition and supplemental brief if our *amicus* brief and our original action motion are not before the Panel. Whether or not they are "filed" they are incorporated by reference **(page 2 of supplemental brief)**. Therefore we fail to see a procedural justification for not informing the Court of our material at the conference January 7th.

Secondly, **Rule 9** itself is a rule of procedure. The conflict of interest under which the legal profession labours in relation to the Kaianereh'ko:wa historically has precluded any lawyer being ready, willing and able genuinely to represent our constitutional position. All lawyers through whom we are forced to speak invariably compromise our legal point. Under the Kaianereh'ko:wa Constitution backed by the U.S. Constitution justice can not be done if the combined constitutional law can be preempted from consideration.

Kanion'ke:haka
Kaianereh'ko:wa
Kanon'ses:neh, *pro se*

per:

/s/ _____
Kahentinetha

/s/ _____
Io ke ron onh

Encl. All booklets re-returned herewith.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

January 3, 2005

Kahentinetha
Route 14, P.O. Box 1016
Akwesasne, NY 13655

Dear Mr. Kahentinetha:

Your motion for leave to file and original proceeding under Article III of the Constitution was received and is hereby returned for the following reason(s):

The original jurisdiction of this Court does not extend to a suit by an individual against a State. The original jurisdiction of this Court generally extends only to cases or controversies between two or more states or between the United States and one or more states. See 28 U.S.C. 1251 and Rule 17 of the Rules of this Court. The Eleventh Amendment amends the language of the Constitution and holds that the Judicial Power of the United States does not extend to any suit commenced or prosecuted against a state by a citizen of another state. The Supreme Court has subsequently held numerous times that states cannot be sued without their consent and that the Eleventh Amendment bars suits brought against a state by citizens of that state. *Hans v. Louisiana*, 134 U.S. 1 (1890).

Your two money orders, each in the amount of $300 are herewith returned to you.

Sincerely,
William K. Sutter, Clerk
By:
/s/_____
Cynthia Rapp
(202) 479-3031

Kanion'ke:haka Kaianereh'ko:wa Kanon'ses:neh
Route 14, P.O. Box 1016, Akwesasne, Kanion'ke:haka [13655]TDC (518)
phone 358-6012 and fax 358-6007

January 6, 2005

William K. Suter
Clerk of the Court
PERSONALLY as well as *EX OFFICIO*
Supreme Court of the United States
Washington, D.C. 20542-0001

Re: Criminally rejected *amicus* motion in 04-671 and original action motion

Dear Mr Suter:

Previously our *amicus* application was rejected for not having the very headings that it unmistakably does have and for lack of a certifying lawyer, in circumstances where the point of our (and Justice Thomas's) constitutional question manifestly is the conflict of interest of the legal profession which precludes the conventional representation under Rule 9. Substance precludes application of the rule. The alternative is treason, fraud and genocide contrary to the Constitution of the United States. Therefore, we returned to you our *amicus* motion for reassessment in the light of these special, and indeed extraordinary circumstances.

Then, earlier today, your office returned our original action motion and the fees for both it and the *amicus* motion, all of which is again being sent back to you by overnight courier so that it will be available for the Court's

conference in relation to *VanGuilder v. USA and NY* 04-671 TOMORROW January 7th. Your assistant mis-identified our motion *qua* "foreign State" as if it were a motion by an "individual." This is the type of fraud by the legal establishment that contradicts the existence of the rule of law upon which our constituents now depend, to rescue them from the genocide caused by the denial of the constitutionally binding force and effect of our Kaianereh'ko:wa.

Please let the Court decide. Obstruction is genocidal as well as unconstitutional.

Yours very truly,

/s/_____

Kahentinetha and/or Io ke ron onh
in right of Kanion'ke:haka Kaianereh'ko:wa
Kanon'ses:neh (a "foreign State")

Encl.